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AMERICAN LAW AND PROCEDURE

VOLUME XIII.

JURISPRUDENCE AND LEGAL INSTITUTIONS

BY

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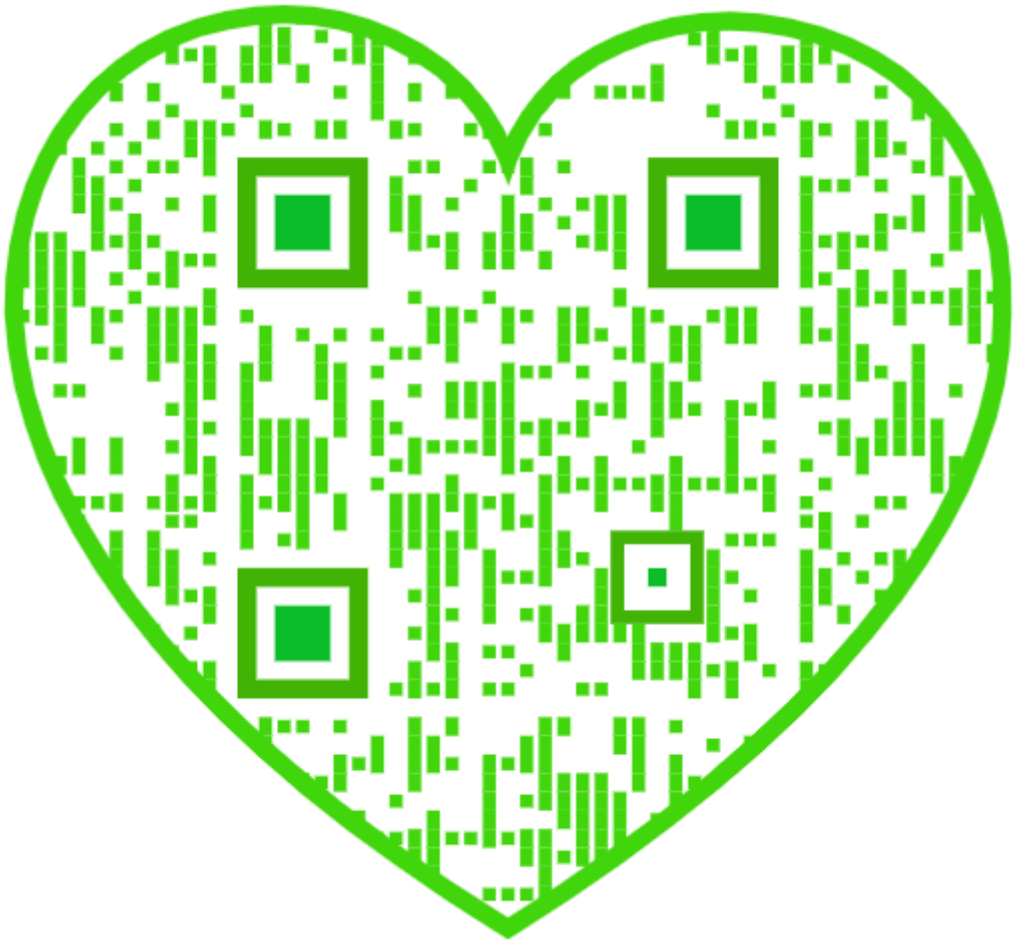

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CHAPTER I.

INTRODUCTION.

§ 1. The practical utility of adopting a scientific method. Science simplifies. Nothing is scientific which is not practical. The most practical methods are scientific. What form is to the athlete science is to the student. In fact, science as applied to the subject in hand discovers the simplest way of acquiring an understanding of the law and points out the line of least resistance in the process of handling the mass of knowledge necessary to obtain that understanding, and not the least important thing is not to handle more than is necessary.

The variety of phenomena and the infinite multitude of individual units which make up the whole of any of the subjects of learning do not by one whit increase the genus or the species to which each individual belongs. These are fixed by nature. The ewe and the ram are types of the genus sheep—and the representative pairs of the typical families are invariably reproduced in every individual of the thousands that roam the fields.

It is the same with those things which, though having no physical existence, envelope and permeate all that is material. Nature presents endless rounds of repetition surely to be counted on, and that with but slight variation.

A learned judge has said that science appeals to common sense for its adoption and Huxley tersely says science is nothing but trained and organized common sense.

The province of science is to render the least and the greatest of these understandable and to subject all to the domain of principles, rules, systems, and it is by these, and exactly in the proportion to the progress in this that "man hath dominion over the earth."

The Law, that body of rules which envelopes us and which we can no more escape than we can elude the air, or ignore the changes of seasons, presents no exception; its multitudinous details expressed by finite minds through the imperfect medium of words and applied to an infinite variety of acts may seem to those unacquainted with the special science of Jurisprudence to present a mere medley of accidents, a conglomerate mass devoid of order. The poet speaks of "The Lawless Science of

the Law"—"A Wilderness of special instances"—but not so—there are no Lawless sciences, the expression is a paradox. Science itself is a law, or the law.

To all persons who acquire the few simple principles of Jurisprudence and those primary and permanent ideas which constitute the fundamental framework of all systems of law, the details of any system of municipal law (1) are not intricate or hard to master. It is well within the powers of the average mind—but many persons make the mistake of seeking to comprehend the mass of rules by a study of the infinite variety of special applications without first obtaining a comprehensive view of the subject as a whole and thus securing a clear understanding of the fundamental ideas which underlie and control all mere rules and precedents.

One of our great teachers wrote that "whoever finds the main outlines of the law left obscure is almost certain to neglect them, and to content himself with learning the practical rules that he can commit to memory, without any effort to understand them. He thus increases greatly the amount of labor before him, if he does not preclude himself from ever mastering the law as a system. It is worth any amount of time and trouble . . . to make general principles plain" (2).

§ 2. **Scope of legal studies.** To one contemplating a study of the laws of any of the modern nations, the task may seem one of difficult accomplishment. When one con-

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1 By municipal law is meant the law of a particular state or nation, not the law of municipal corporation, cities, towns, etc.

2 Hammond's Blackstone Pref. XIX.

templates that many of our most familiar principles have their origin in the distant past, and their development and application illustrated by the incidents involved in the history of almost every civilized country influenced by Roman and Greek civilization, the difficulty of obtaining a familiarity with the principles of jurisprudence, or the details of the system of actual law, naturally seems so great as to be beyond the powers of the ordinary mind, but this is not a true impression. Jurisprudence is a body made up of an astonishingly small number of principles and few details. The law of any country even with its large number of rules is governed by a comparatively few principles which in most cases are a guide to what the rule will be.

The problem which confronts the author attempting anything like a comprehensive exposition of American Municipal Law is one requiring the constant application of scientific methods, for it is only by these that this seeming chaos can be given the order of a system, and be made to assume, as it is in reality, a simple, knowable system of rules.

The science which we invoke in this process passes under the name of jurisprudence.

Like all of the sciences, jurisprudence is not the result of a spontaneous growth, but is the result of slow processes of study, thought, reasoning, by which general principles are discovered, and out of the multitude of single instances general rules are formulated which become the law applicable to like circumstance when they shall arise.

Mr. Justice Holmes very graphically pictures the scope of the task which lies before the student of the law who

wishes to become a scholar, and then divests it of its terrors by pointing out the manner in which this task may with comparative ease be accomplished.

"The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analysis and abstract universals of theoretic jurisprudence. . . .

"The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports. . . .

"Jurisprudence, as I look at it, is simply law in its most generalized part. . . . The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself.

"Theory is the most important part of the dogma of the law, as the architect is the most important man who

takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been said, that an interest in general ideas means an absence of particular knowledge'' (3).

Here it is clearly indicated that the first thing to acquire is a grasp of the frame-work of principles which is displayed by the outline of the law and upon this build the body rules.

Another great suggestion made by Justice Holmes is that the student avoid attempting to attain a knowledge of all systems but apply himself to acquiring an accurate anatomy of one system.

''The way,'' he says, ''to study a system of law is not to study something else but to go right to the bottom of the subject in hand.'' This sounds very simple, it is simple and it is scientific, for, after all, science is only common sense applied to existing conditions.

§ 3. **Method of treatment.** In every extended discourse, and particularly a discourse on law, there are certain general principles, fundamental ideas and elemental words which are implicated in the various parts of the work, and in harmony with the foregoing pages we will, before taking up the detailed treatment of the various topics displayed by the outline, explain these general principles and fundamental ideas. This method

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[3] The Path of the Law, Harvard Law Review, Vol. 10, 457, p. 1897.

of exposition is likewise the adaptation of the method made use of by continental jurists and is recommended by our best English scholars.

Sir Frederick Pollock and Professor Sheldon Amos sufficiently describe this method and its effect. Pollock says: "Another principle of division is that by which, in dealing either with a whole body of law or with a substantial department thereof, those principles and rules which are found in all or most portions of the subject, so that they may be said to run through it, are disposed of before the several branches are entered upon. Such principles and rules may relate to the nature of duties and rights in themselves, to the condition of their origin, transmission, and extinction, or to the remedies applicable. The setting forth of these matters in advance, so as to avoid repetitions and awkward digressions in the subsequent detailed treatment is called after the German usage, the General Part of the work in hand. In the Special Part the several topics are dealt with in order and the general principles having already been stated, only those rules are discussed which are peculiar to the subdivision in hand or are in some peculiar way modified in their application to its contents. Thus Savigny's great work on Roman Law is only the "General Part" of his projected system. Well framed legislative acts on large subjects usually proceed in some such manner from the general to the special—thus the first six chapters of the Indian Contract Act contain what a continental writer would call the General Part of the law of contract; namely, rules of law by which the formation, validity,

and effect of all kinds of contracts alike are governed in British India. The other chapters which deal with sale, agency and other species of contracts might be called the Special Part of the Act. Notwithstanding the obvious advantages of this method, it has only gradually and of late years come into use among the English lawyers" (4).

Professor Amos says: "There is no single topic which, when fully treated, does not involve at once the considerations of Rights, Duties, Procedure, and Penalties. But to treat of these elements at once, under each topic in succession, must involve endless repetitions, and vastly increases the bulk. Thus, in English text-books on the Law of Bills of Exchange there will be found not only a description of the nature of such Bills, and of the Rights and Duties of the Parties to them, but also an account of the Laws applicable to Frauds upon them, and to detaining and stealing them, as well as to the modes of Pleading and of Evidence in respect of them. . . . Thus, in treating of Rights of Ownership in Land, it is not possible to avoid constant allusion to certain definitely recognized modes of violating those Rights, such as Trespass. Yet the topic of Trespass is a large and independent one, and will more appropriately fall under the Law of Civil Injuries, and that branch of it which deals with Torts. Only mutual references, combining the two topics, can avoid repetition and omission" (5).

§ 4. **The scientific or institutional system.** By the institutional system is meant a plan of study which at the

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[4] Harvard Law Review, pp. 198-9.

[5] Amos' "An English Code," pp. 33-4.

outset places before the student an outline of the field he is to investigate and the most fundamental principles of the science he is to apply and the subject he is to investigate and by means of this system at all stages of progress make clear the correlation and interdependence of the various topics.

All students of the logical science understand that modern science invokes the same principles which constituted the basis of the Aristotelian System of Philosophy, very concisely expressed by Spencer in his "Synthetic Philosophy:"

"The doctrine that correlatives imply one another has for one of its common examples the necessary connection between the conceptions of the whole and the part. Beyond the primary truth that no idea of a part can be framed without a nascent idea of some whole to which it belongs, there is a secondary truth that there can be no correct idea of a part without a correct idea of the correlative whole. There are several ways in which inadequate knowledge of the one involves inadequate knowledge of the other."

This is the identical idea now applied by modern German critics and jurists. It is clearly explained in an article by Richard Meyer in the International Monthly for May, 1901:

"What they aimed at, these disciples and successors of the great critics, was the same, in spite of their different fields, in spite of their different natures. They aimed at a wholly new kind of comprehension, one essentially different from what had been previously under-

stood—as essentially different as is the insight into the anatomical structure of a plant which the microscope gives, from that which the eye had previously permitted. No! The difference is still greater. For it is a question of a qualitative, not merely a quantitive, progress in comprehension."

"For us there is no longer such a thing as comprehension apart from universal context. No isolated phenomenon exists any longer, or, if it exist, it can be explained from its isolation."

In the German schools, the same idea dominates the conception of jurisprudence. Falck says: "Science is the objective and universal meaning of the term, designates a body of truths methodically arranged. The sciences are divided theoretically into several branches or departments, according to the different objects of knowledge with which they deal. . . . In this way the sum of knowledge which relates to right and law practically constitutes the special science of jurisprudence."

"Three things are requisite in order that the representation of the rules of law recognized in a country may really deserve the name of a science. First, the principles of right and law must be so completely treated that no jural relation shall remain unexplained, at least in its essential point. Second, the grounds upon which the jural truths rest must be convincingly developed. Third, and finally, the arrangement of the whole system must be carried out, even in its individual parts, according to the principles of its internal essential connection and not in accordance with an arbitrary scheme. The essential

character of the system consists in the union of these three qualities: Completeness, depth or fundamentalness, and order."

"Jurisprudence," says Puchta, "is scientific knowledge of the system and history of right. The science of right [law] has therefore two sides, the one systematical [we would say analytical] and the other historical; and in the proportional combination of them, the true method of jurisprudence consists. But this does not exclude the condition that a scientific investigation and exposition of right in some particular relation, may proceed preeminently by the one method rather than by the other. It is not a one-sided method of procedure to give prominence to one side of the whole subject; but the jurist is to be called one-sided when he deals with one side of his subject as if it were the whole of it. The systematical knowledge of right is the scientific knowledge of the inner connection which unites its parts together. The individual part is thus apprehended as a member of the whole, and the whole system is viewed as a body that unfolds itself in particular organs. . . . It is only the systematic knowledge of the right that can be regarded as a complete knowledge of it. . . . Were we to regard the science of right as a mere aggregate of jural propositions we would never be certain that we had made it our own in its whole extent; just as a part of a heap of stones may be wanting without the spectator becoming aware of the defect, whereas, when they are built into a work of art, a single stone cannot be wanting without the blank becoming manifest. And so it is, conversely, in

reference to the precise determination of the outline of the whole."

Prof. Hastie, who translates a considerable portion of the writings of the modern German jurists, for use in the universities of Great Britain, after explaining the relative fields occupied by the great German jurists, Savigny and Puchta, as representatives of the historical school, Falck and Friedlander, as exponents of the analytical or systematic school of exposition, says:

"These elements, notwithstanding their different origin, constitute a unity in virtue of their relation to the unity of the science. It is their treatment from different points of view of that unity which forms the characteristic method of this little book. That method is briefly the representation of all the rational elements in the science as constituting one systematic whole. Such a method, if legitimately carried out and successfully realized, is not only a convenient guide to the synoptic arrangement and study of the science, but the principal means of giving prominence and certainty to its constituent truths. If the relations of its parts are shown to be real, and are realized in their inter-connection, every part of the science thus established will give cohesion and stability to every other part and to the whole.

"This is what the Germans mean by Encyclopædia as a method of science, and even as the highest culminating method of reason, in its ultimate determination of truth. It is this idea which, in its varied application to the different departments and details of empirical knowledge, has been gradually making all knowledge systematic, and

uniting it into an organic whole. The conception practically evolved and applied in England by Bacon and later thinkers, has been more methodically dealt with in Germany by her recent masters of thought, and more formally applied by workers in detail to their special sciences. The Encyclopædic Method has thus been systematically applied by the German jurists to their proper science, and much of their success as comprehensive and original thinkers and investigators has been due to it. In view of that success, and especially of the degree in which they have thus been guarded against one-sidedness and the aberrations of a partial method, it seems more than time that both the name and the reality of Juristic Encyclopædia, should be introduced into England.

"Juristic Encyclopædia is not only the proper scientific form of introduction to the science of jurisprudence generally, but it is also the appropriate disciplinary preparation for the systematic study of positive law. It stands to it in a relation analogous to that of mathematics to the physical sciences, or of grammar to the details of the several languages. It may thus be said to exhibit the definitions, axioms, and forms of proof, or the elements, rules and relations involved in all legal systems. The urgency of its requisiteness and the degree of its availability will depend upon the character and constituents of the particular system under consideration. But it is universally felt and acknowledged that there is no system in relation to which the student so much requires the help and guidance of introductory discipline and conscious method as that of English law. English law, says Mr.

Frederic Harrison, 'is of all the systems of law that one which most requires a scientific introduction by a training in principles.' Mr. Austin has also well said: 'To the student who begins the study of the English law without some previous knowledge of the rationale of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approach it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it as a system or organic whole, with comparative ease and rapidity.' "

In like manner, Mr. Phillips, in his able and independent discussion of jurisprudence, says:

"I firmly believe that the intolerable aridity usually attributed to legal study is entirely due to the infatuation with which the student usually persists in exploring the details of his science before he comprehends its outlines. What every jurist has first to do is to make himself master, not of the law itself, which may be pernicious and must be imperfect, but of that great system of jural problems which forms the framework of all law, and which, as it arises out of the conditions of human existence, must retain its importance while the human race survives. . . . To all this nothing further need be added to justify an attempt to meet such a crying practical want, and to remedy in some measure such deplorable unscientific confusion. It is confidently claimed for the following pages, notwithstanding their foreign origin, that the simplicity, comprehensiveness, and vitality of

the scientific conceptions they present are fitted not only to guide the student along the great open highway of jurisprudence, but to conduct him intelligently to all the special fields of law—English, Scottish, American, or however named—that he may desire to reach and to cultivate."

§ 5. **The same: Views of American scholars.** The late Dr. Hammond, who is universally acknowledged to be one of our greatest legal scholars, points out the cardinal defect in our legal education in the following terse language: "Another matter which seems to me of great importance, but in which our courses have heretofore been signally deficient, is the teaching of law as a system. In schools of the first rank, where each of a dozen different branches of the law is admirably taught, not a single lecture or recitation, from the beginning to the end of the year, is heard upon the connection between these, the classification of the law, or the relation of these parts to the whole. The graduate of such a course may know perfectly the rules of contract, or torts, or equity, etc., but when a case arises in real life he can never be sure that there is not lurking somewhere in the vast fields of law a rule that may bear upon the facts presented, and change their entire meaning. No man can be a safe counselor, or even feel reliance on his own judgment, while his knowledge of the law is thus confined to its detached parts. I do not mean that the student must learn all the law. Such a requirement would be absurd. It is as true of the law as of every other subject of human knowledge that a good education consists not merely in knowing the

most necessary part of it, but equally in knowing the existence of that larger part that lies beyond. The most hopeless ignorance of a subject is that which, knowing some little corner or fraction of it, takes that for the whole, and knows not its own ignorance of the rest. The only fatal ignorance is that which knows not where to look for information" (6).

The tendency of most recent thought to return to the scientific method may be gathered from the following extract from an article by Professor Monroe Smith, of Columbia College (7):

"In a period of educational experiments, such as that through which we are now passing in the United States, it is of interest to consider the phases through which legal education has passed in Europe. Office training, the text-book system, the lecture system and the case system are all very ancient things; and there is hardly any conceivable combination of these systems that has not existed in Europe at some time within the last twenty centuries.

"Two thousand years ago the young Roman who desired to learn the law associated himself as auditor with a jurist of established reputation." . . .

"With all this, there were books to be read. . . . There were already standard treatises; systematic presentations of the civil (or as we should say, common) law, monographs on special topics, and above all, collections of the decisions rendered by eminent jurists which had been accepted as authoritative precedents.

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[6] Southern L. Rev. 422 (1881).

[7] Columbia University Quarterly, March, 1902.

"There existed also, at the close of the republican period, the beginnings of systematic instruction. . . . It was already customary to give to beginners a general view of the whole field of the law. Servius Sulpicius for example 'was grounded (institutus) by Balbus Lucilius, but was chiefly instructed by Gallus Aquilius' . . . . . Under the Empire regular law schools were established. . . . In the first year the students heard lectures setting forth, in outline, the leading principles of the civil and praetorian law or, as we should say, of common law and equity. The famous Institutes of Gaius are thought to be such a course of lectures. During the remainder of the first year and through the second, the praetorian edict was expounded, chapter by chapter, with illustrative cases, and the more important parts of the civil law were developed in the same way. The third year was devoted wholly to the discussion of leading cases in all branches of the law. A fourth year was given to private study.

"We may conjecture that in the second, third and fourth years much reading of standard commentaries and much study of cases were required. If we are to judge by results, no better system of legal training has ever existed; for this system produced the great jurist-judges of the third century—Papinian, Paul and Ulpian. Justianian made no change in the system, except to furnish authoritative texts, and to lengthen the period of class work by one year." . . . After explaining the methods in vogue in Germany, he adds:

"The European university clings to the good old habit of helping the student to correlate his courses and to

see the law as an entire system by starting him in his studies with a general view of the whole field (Encyclopadie), or at least of the entire private law (institutes). The dominant view in American law schools at the present time is that such a course, if given at all, should be given at the end rather than at the beginning of the legal curriculum. It is said that it is of no use to furnish a student with a set of mental pigeon holes until he has something to put in them; but it is perhaps possible to put in each just enough to determine its character and to serve as a nucleus for further deposits.

"As far as the Roman law was concerned, Gaius was rather successful in doing precisely this thing. It was said, again, that such a course, given at the beginning, is opposed to the 'inductive principle.' Perhaps, however, there is no one principle of education by which alone we are to be saved from unscientific thinking, and perhaps we are overworking the inductive principle. At least, there is no question that such a course should be given somewhere in the curriculum and in most of our law schools it is not given at all." . . .

"Again in all the European universities legal history is taught with a thoroughness which has no parallel in our American education. The case system is said to be a historical system, but it gives only a history of special doctrines. It affords no view of the development of the law as a whole." . . . He concludes:

"European law faculties may with advantage make use of our case system—if we call that ours which existed at least sixteen hundred years before America was dis-

covered—and we may, with profit, imitate their historical and systematic treatment of law and their seminaries."

If reflection is given to this subject, greater meaning is found in the often quoted expression of Lord Bolingbroke (tempo 1736):

"There have been lawyers that were orators, philosophers, historians; there have been Bacons and Clarendons. There will be none such any more, till men find leisure and encouragement for the exercise of this profession by climbing up to the vantage ground, so my Lord Bacon calls it, of science. Till this happen, the profession of law will scarce deserve to be ranked among the learned professions; and whenever it happens, one of the vantage grounds to which men must climb, is metaphysical, and the other, historical knowledge. . . . They must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced."

§ 6. **Objects of historical and comparative study of law.** The object of historical study, aside from the interest every scholar naturally feels is to ascertain the germs and development of legal ideas, in order to determine which of them have survived, and whether, of those which have perished or lie dormant, there may not be some of value and worthy of present adoption. The most remarkable instance of this sort of review is given us by the course pursued by the founders of this Republic, for as we shall see, there is scarcely an idea made use of as an ele-

ment in the new government which was wholly and entirely new; whereas, there are several important, distinctive features in the American Constitution, the application of which had been advocated and successfully resisted for centuries.

The utility of the comparative study of legal phenomena consists in discovering the similarity or divergence of the development and discovering thereby how the different social organizations or nations differ, and how elemental institutions obtained a footing and the development of one sort in one community and a different one in another.

Most students who have reached the age where they would naturally read a discourse of this character have heard of the different schools of study called the historical schools, analytical schools, and an impression seems to prevail in some quarters that there is antagonism between them and that the one is preferable to the other. The truth is, they are not independent methods. There can be no such thing as independent historical research which excludes the analytical discrimination necessary to distinguish things from each other, and essential to the comparison of subjects.

The primary function of the historical method is the discovery of the existence of facts. The primary function of the analytical method is the differentiation of things, and their arrangement into classes and subclasses; or, in other words, analysis is one of the processes of classification, and when applied in combination results in what is known as the inductive system of exposition,

which necessarily involves the methods or processes of analysis and synthesis in the creation of an orderly exposition.

That this conception of these methods is the correct one finds confirmation in the writings of one of our greatest scientific jurists, wherein, speaking of Bentham, he says:

"He (Bentham) employed, however, the true analytical and inductive methods by which alone the Science of Jurisprudence could be brought into existence" (8).

§ 7. **The first principle of logical science.** It was the organization of these methods into a system which constituted Aristotle's great achievement, and introduced the order of a science as applied to all original investigation and exposition. Whether consciously or unconsciously, this is the process of definition. One of our greatest jurists has emphasized the importance of this primary conception, and indicated its application to our law. James Wilson, in his lectures before the Pennsylvania Law School, says:

"You have heard much of the celebrated distribution of things into genera and species. On that distribution, Aristotle undertook the arduous task of resolving all reasoning into its primary elements; and he erected, or thought he erected, on a single axiom, a larger system of abstract truths, than were before invented or perfected by any other philosopher. The axiom, from which he sets out, and in which the whole terminates, is, that what-

[8] Amos' An English Code, p. 201.

ever is predicated of a genus may be predicated of every species contained under that genus, and of every individual contained under every such species. On that distribution likewise, the very essence of scientific definition depends: for a definition, strictly and logically regular, "must express the genus of the thing defined, and the specific difference, by which that thing is distinguished from every other species belonging to that genus. . . . By definitions, if made with accuracy—and consummate accuracy ought to be their indispensable characteristic—ambiguities in expression, and different meanings of the same term, the most plentiful sources of error and of fallacy in the reasoning art, may be prevented; or, if that cannot be done, may be detected. But, on the other hand, they may be carried too far, and, unless restrained by the severest discipline, they may produce much confusion and mischief in the very stations which they are placed to defend. . . . By some philosophers definition and division are considered as the two great nerves of science. But unless they are marked by the purest precison, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding—they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of a first principle, will spread confusion, distraction, and contradictions over the remotest parts of the most extended system" (9).

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[9] Wilson's Works, pp. 51, 50, 52. By division Justice Wilson means classification.

§ 8. Origin and earliest manifestation of law. Law grows spontaneously, and among a free people is continually adjusting itself to the needs and wants of society. Indeed, the history of the past has shown that not all the efforts of monarchs have been able to check this spontaneous growth of law. As we proceed it will become clear that there is a great difference between law and jurisprudence. Law is the subject matter upon which jurisprudence operates. The province of the legislator is to adjust the form of the expression of the law to the needs of the present conditions. The province of jurisprudence is to discover the fundamental principles, and to give such form and order to the body of law as will better enable those who administer it to understand and apply its rules and principles.

The most logical method of exposition is at the earliest possible moment to bring into view the most fundamental conceptions, those ideas which have operation in every part of the subject, and to present as early as possible an outline which shall display the whole field which the student will be asked to investigate. These outlines in their synoptical form have been placed at the head of this chapter. Our present task will be to make these outlines clearly understandable. This can only be done by showing the development of the principles upon which they are based.

The principles of law and jurisprudence have had an historical development. They cannot be understood apart from their evolution. It will therefore be necessary to notice the development of law sufficiently at least

to enable the reader to understand not only the beginnings of law, but the beginning of that science which has especially to do with law, and it will be well at the beginning to state what in conclusion we shall hope to make plain, namely, that the jurisprudence of a country is the true exponent of its civilization.

We can imagine a condition existing among men where there was no rule imposed or regarded by which the conduct of one towards the other was regulated, but this condition is so remote as to be beyond the pale even of tradition. The development of man from the rude primeval state is a subject concerning which even the greatest scientist can only conjecture. Man has existed as a gregarious animal and a social being for many centuries beyond the most remote tradition, but modern science does not admit of a political state of nature antedating society.

There have been those who have taken the individual as the original unit of society, but this theory cannot be justified by actual facts. Indeed, Professor Amos tells us: "From the most opposite poles of thought—as for instance, from such diverse writers as Auguste Comte, Sir H. Maine, and Professor Maurice—a remarkable consensus of testimony has appeared within the most recent times to the effect that the integral constituent or atomic element of human society has ever been and is, not the individual citizen, but the corporate Family" (10).

§ 9. **The earliest foundation of government.** The germs of modern civilization lay in the seed of law. When

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[10] Amos' "An English Code," p. 214.

several agreed that they would observe a certain rule of conduct, or when one said to the other "You must do this or that," then you have the beginnings of a social state which has gradually developed into what we term civilization.

A very considerable body of law may exist without reaching that stage of development which is understood when we use the word civilization, and law and civilization may to a considerable extent develop before anything appropriately termed jurisprudence is brought into existence. Law and civilization are so intimately blended that the former is necessarily implicated in the latter.

In this age we are so accustomed to see science leading the way of progress that we fail to observe that there was an immensely long period when instinct was the guide and accident the only pathfinder. It is a long step from this period to that where reason is directing empiricism and experiment. Ages of real progress in a true civilization intervened before the time was reached when assumed postulates did not satisfy, and there arose those who demanded a reason for all things, and inductive reasoning was fairly established as the basic principle of science.

While, as has been truly said, Aristotle Platonizes, that is to say, draws much of his system from others, yet it may be truly affirmed that modern science had its birth with Aristotle, and no branch of science received a greater impulse than that department of learning within the scope of the word jurisprudence.

However interesting the study of the manners, customs and institutions of the more ancient communities, the

initial point in the development of modern law and government is to be found in that community of Hellenic states surrounding the Aegian Sea, and this real initial impulse which, though at times it seems to have lost its momentum, has at all times and in all parts of the occidental world influenced the course and progress of that civilization of which the Law and Jurisprudence of the United States is a lineal descendant.

It would be futile to attempt in a work of this character to trace the growth of ancient law, even in those early communities which made direct contribution to Grecian and Roman law, and indeed something more useful can be done. These facts and events are the elements of our Histories of the Roman Law. Beyond this the works of Sir Henry Maine furnish ample information. There is, however, a higher reason; the great and fundamental ideas of jurisprudence are not events or facts of the kind noticed by the Historian, and may be entirely passed by, or but obscurely noticed, by one who is a faithful historian.

The great elements of jurisprudence are the philosophic investigation, comprehensive instructions and scientific exposition, which bring into clear view the great and permanent principles which are fundamental and controlling, and against which ordinary legislation strives in vain, and to which societies must and will conform (11).

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11 Amos' "An English Code," p. 58. "Savigny's leading position is that the largest portion of the Law of every Nation is the exact product and measure of the whole National character and temper; that each element of that Law has a real, though often secret and undecipherable, relation to the whole, as well as to all the central characteristic Institutions of the Nation; that the study of a mature System of Law is something far more than a mere committing to memory of a number of Legal Rules,

If these things can once be clearly seen and firmly grasped, all the varying minutiæ of rules and minute variety of application cannot confuse, and may be easily understood.

Modern science has determined with reasonable certainty that the first systems of law were based upon the assumption of power on the part of those who assumed to control the affairs of society. The same scientists have also agreed that as societies have become enlightened, civilization developed, and the modern ideas of liberty have obtained foothold, the assumption of this right to command has given place more or less completely to the idea of agreement as the basis of organized society. Herein lies the controversy concerning the divine right, original compact, and consent theories, which will be examined in subsequent pages of this work.

The student who desires to investigate the earliest forms of manifestations of law will perhaps accomplish his purpose as well by selecting some ancient system with well marked characteristics as an example, and then by comparison with other systems ascertain whether or not the evolution in different parts of the world displays a

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and implies a profound familiarity with a few leading principles on the one hand, and with the mode of their application to an infinite variety of details, on the other, he held that the Roman Lawyers of the best period exhibited their excellence pre-eminently in this,—that 'for them Theory and Practice were never separated, their Theory being fashioned ready for immediate application, and their Practice always ennobled by scientific treatment. In every principle they saw at once an instance of its application; in every legal situation they saw at once the Rule which was applicable to it. And their mastery of their art is most conspicuous in the ease with which they travelled from the General to the Particular and from the Particular to the General.'"

variety of primitive forms of social order, and wherein lie the characteristic differences.

Sir Henry Maine, whose discourse on Ancient Law enjoys the highest reputation, affirms that "Theories plausible and comprehensive, but absolutely unverified, such as the law of nature or the social compact, enjoy a universal preference over sober research into the primitive history of society and law." As before remarked, such theories are mere assumptions. In the nature of the case they are incapable of proof, and in the light of modern science the social compact theory as an original institution of law is too improbable to be seriously considered. So far as history and reasonable conjecture may guide, it may be regarded as established that the earliest theory as a basis for the exercise of governmental authority was in some manner based upon religion, and traced its title through divine authority. Its basis in fact has in almost all ages been force and fraud.

Professor Maine's statement may be taken as the basis of comparison, and the student or scholar may consider in connection with it the Ancient Hebrew Society, Oriental Communities, as well as the more modern Grecian, Roman and other European States. It is believed that a comparative study will discover that in all of them the divine sanction is in some form or other invoked as a justification and authorization of the assumption of the reins of government. At precisely what point men began to question the basis for this assumption, and to assert the opposite theory which has become the basis of modern civilization, is of course difficult to determine, but as we

shall see, this idea had obtained a footing as early as the age of Homer.

Professor Maine says: "The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words "Themis" and "Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that "Themis" is described in the "Iliad" as the assessor of Zeus. It is now clearly seen by all trustworthy observers of the primitive condition of mankind that in the infancy of the race men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person, and of course a divine person; the sun rising, culminating and settling was a person, and a divine person; the earth yielding her increase was a person, and divine. As then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was THEMIS. The peculiarity of the conception is brought out by the use of the plural. THEMISTES, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use; but it must be distinctly understood that they are not laws but judgments, or to take the exact Teutonic equivalent, "Dooms." "Zeus," or the "Human

King on Earth," says Mr. Grote, in his "History of Greece," "is not a lawmaker but a judge. He is provided with 'Themistes,' but consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments."

Even in the Homeric poems we can see that these ideas are transient. Parities of circumstance were probably more common in the simple mechanism of ancient history than they are now, and in the succession of similar cases awards are likely to follow and resemble each other.

Here we have the germ or rudiment of a custom, a conception posterior to that of Themistes or judgments. However strongly we with our modern associations may be inclined to lay down a priori that the notice of a custom must precede that of a judicial sentence, and that a judgment must affirm or punish its breech, it seems quite certain that the historical order of the ideas is that in which I have placed them.

The Homeric word for a custom in the embryo is sometimes "Themis" in the singular; more often "Dike," the meaning of which visibly fluctuates between a "judgment" and a "custom" or "Usage." Νόμος, a Law, so great and famous a term in the political vocabulary of the later Greek society, does not occur in Homer (12).

This notion of a divine agency suggesting the "Themistes" and itself impersonated in Themis must be kept apart from other primitive beliefs with which a superficial inquirer might confound it. The conception

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12 Maine's "Ancient Law," p. 4, et seq.

of the Deity dictating an entire code or body of law, as in the case of the Hindoo Laws of Manu, seems to belong to a range of ideas more recent and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides. A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices, and every now and then the same duty is even more significantly recognized in the purifications and expiations which they perform and which appear intended to deprecate punishment for involuntary or neglectful disrespect."

The student will not fail to observe the modern conception of law will not coincide with the ancient idea.

CHAPTER II.

PRINCIPLES OF RIGHT, LAW, AND GOVERNMENT.

§ 10. American law. American law is the resultant product of the world's progress in the domain of Jurisprudence and Politics (1). In its highest aspect and most permanent form, it is a great body of doctrines and principles drawn from the water-shed of the world's civilization (2). The societies which united to form the American Nation, came together from many lands and came imbued with diverse ideas of Religion, Law, and Liberty. They became a people under the stress and pressure of causes impelling them thereto, under peculiar conditions, they ultimately created the Government which now endures and based it upon principles never before made the foundation of a great Nation.

This constitution was not modeled after any other which had existed. The statement of Madison is quite true, that "had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the

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[1] See infra, Sources and Systems of Law.

[2] The truest gauge of a nation's civilization is its system of Jurisprudence. Baldwin's Modern Political Institutions, 293; see also Guizot Hist, Civilization, ch. 8.

United States would, at this moment, have been numbered among the melancholy victims of misguided counsels; must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe" (3).

§ 11. United States a leader in the science of government. The framers of the constitution of the United States approached the task of framing a national constitution with an equipment for such work which could not have been so well gained in any other manner than by the experience of the decades which intervened between the time when the alliance between the colonies first became a real union and the time when it became apparent to all that the confederation between the states lacked entirely the national character. It was then that the architects of the new nation began seriously the work of selecting the fundamental principles as materials and the theories for framing them into a new form of Government (4). They were thoroughly appreciative of the

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[3] Federalist, No. 14.

[4] Mr. Justice Wilson, in his opening lecture (before the Law School now the University of Pennsylvania) said: "The foundations of political truth have been laid but lately; the genuine science of government, to no human science inferior in its importance, is indeed but in its infancy, and the reason of this can be easily assigned. In the whole annals of the Trans-Atlantic world, it will be difficult to point out a single instance of its legitimate institution. I will go further, and say that among

peculiarity of their situation in the condition of equality of the citizens and the opportunity there and then open to them to create a National Government on such principles as the people chose to approve.

They were thoroughly alive to the dignity of the position, the magnitude of their undertaking, and the probable effect of their experiment upon the nations of the world (5).

§ 12. Right and law, jural conception. Every society where right and law are respected must be organized upon and operated in conformity with certain fundamental axioms or principles of Right, Law and Government. Reflection makes it obvious that the absolute monarch cannot admit the principles which obtain under a constitution where prerogative is limited by compact and charter and that a republic of equal citizenship cannot subscribe to the idea of the omnipotence or supremacy of even the legislative branch of Government. The builders of this nation were confronted with this great fundamental question. There were many conflicting theories and out of these they created a new Government on a new model, differing fundamentally on all the great parts of its structure and widely on subordinate details of

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all the political writers of the Trans-Atlantic world it will be difficult to point out a single model of its unbiased theory." 1 Wilson's Works (last ed.), 20, quoted by Simeon Baldwin, American Bar Association, Rep. (1889).

[5] Mr. Wilson said in the Pennsylvania convention of 1787: "By adopting this constitution we shall become a nation; we are not now one. We shall form a national character; we are now dependent on others." He proceeded with a remarkable prediction of the influence which American freedom would exert upon the Old World, Elliott's Debates, vol. II, p. 526.

property jurisdiction and procedure. "In every legal system, there is to be found a great hierarchy of leading principles—commencing at the central Institutions of the Family, the State, Ownership, Contract, and Procedure, and proceeding to the order, next in succession, of Rights and Duties, and Acts and Events giving rise to Rights and Duties, till the finest modifications are reached in the accurate delineation of Rights and Duties as dependent on an indefinite variety of states of fact." Amos on Eng. Code, p. 68.

What then is the American Jural conception of Right and Law? Quite frequently, if not generally, Law and Right are treated separately, thereby obscuring the truth that they are correlatives which can no more exist apart than can a shadow exist without light and substance; Right is the result of Law; Law the life and light of Right. "The words which denote the instruments and materials of legislation and the subject-matter of jurisprudence are Law, Sanction, Title, Right, Obligation. The definitions of these five terms may, indeed, be regarded as a single definition, for the things denoted by these five words are merely the same thing looked at from different sides: at least they are correlative ideas, indissolubly connected parts of the same indivisible whole. The definitions of these terms which we proceed to give are their definitions, it is to be observed, as used in jurisprudence, that is, in the exposition not of natural or moral laws but of positive or political laws, and are accordingly unconnected with the hypotheses of any particular school of Ethical speculation. . . . "Every

Right implies law by which it is created, a Title to which it is annexed, a Sovereign by whom it is enforced, a sanction by means of which it is enforced, a person in whom it resides, and a person on whom a correlative obligation is incumbent. The same, mutatis mutandis, may be said of every relative Obligation." Poste's Gaius, p. 2. The word Right is here used as a substantive and not as an adjective indicative of a moral quality to be contrasted with bad, iniquitous, etc. (6) The necessity and utility of this inquiry is plain. James C. Carter, long recognized as a leader of our bar, says: "There is one branch of legal study quite essential, as I think, in the making of a thorough lawyer, to which I fear sufficient importance is not attached in the schools, and concerning which no little misapprehension exists. I mean the elementary inquiry what law really is, and the sources from which it proceeds. The mind so constantly views it as something to be obeyed, that it is naturally taken to be a command, or a body of commands, proceeding from the supreme power in a State; and such it has been defined to be by the highest authorities, among them Blackstone

[6] "We may therefore define a 'Legal right,' in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others."

"If the expression of widely different ideas by one and the same term resulted only in the necessity for these clumsy paraphrases, or obviously inaccurate paraphrases, no great harm would be done; but unfortunately the identity of terms seems irresistibly to suggest an identity between the ideas which are expressed by them." Holland Juris., p. 72-73.

"All legal right and wrong had its origin after human society was put in motion and began to reflect and act. To talk of Law and Right as applied to mankind at a supposed time anterior to society beginning to think and act is a contradiction in terms." Keener's Selections juris., p. 13.

and Austin. I have long thought this to be a serious error. It might, indeed, be admitted to be true in respect to statutory law; but this constitutes an extremely small part of the body of our jurisprudence. The bulk of our law is composed of those unwritten precepts and rules which are recognized and enforced as law by the judicial tribunals, irrespective of any legislative sanction. The writers I have named assume that the legislature really adopts and enjoins obedience to the precepts and rules declared by the courts" (7).

"Savigny's leading position is that the largest portion of the law of every Nation is the exact product and measure of the whole National character and temper (8), that each element of that Law has a real, though secret and undecipherable, relation to the whole, as well as to all the central characteristic Institutions of the Nation; that the study of a mature System of Law is something far more than a mere committing to memory of a number of Legal Rules, and implies a profound familiarity with a few leading principles on the one hand, and with the mode of their application to an indefinite variety of details, on the other" (9). Markby on the other hand goes to an untenable extreme, when he affirms that the ideas of law cannot arise until after a number of special decisions (10).

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[7] Hints to Young Lawyers—Address, Columbia U. 1894.

[8] This is in truth the national will or public opinion. This expression must be taken in a broad way, for it is among the provinces of a constitution to control the popular will.

[9] Amos' "An English Code," p. 58.

[10] Element of Law 4th ed. sec. 95.

§ 13. Society is a natural condition. The state or society is the necessary and normal, i. e. natural, whole of which men are parts. It is therefore an original rational organism like reason itself, an original fact, an essential condition of human existence. The science of right cannot begin with the supposition of a condition of human life, before the state existed (11).

Jural Right is the Product of the Combined Will of the People (12). That is, individual right and aggregate right come into potential existence by virtue of the will or as we say by consent (13). Right then in the general sense is the capacity of the person to do or refrain from doing acts, to have use and dispose of things according to the law of the land (14).

Puchta says, "Freedom is the Foundation of Right and real relations of Right emanate from it. . . . In thus founding Right upon the possibility of an act of the will, the essential principle of right is indicated as that of equality (15). Jural or legal right is in and of society. "All legal right and wrong has its origin after society was put in motion. To talk of law and right as applied

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[11] Puchta-Hasties, Outlines of Juris., p. 140; Penhallow v. Doane 3 Dall. 547, 93; 1 Wilson's Works, 270.

[12] Puchta-Hasties Outlines, p. 152.

[13] 1 Wilson's Works, 170.

[14] Holland Juris., 71. Hasties Outlines Jur., p. 12. This idea of a Right is clearly the legal view in England and America. Calder v. Bull 3 Dall. 386-394 quoted by Webster Arguendo, Dartmouth College Case, 4 Wheat. 576. The reasoning of continental Jurists is peculiarly analogous to the American idea. e. g. see Hasties Outlines Jud., pp. 127, 140, 152.

[15] Hasties Outlines, p. 12.

to mankind at a supposed period anterior to society is a contradiction of terms'' (16).

§ 14. **The bases of government, conflicting views.** There have been two schools of thought existent from the earliest times and while one of these lay dormant for centuries, it has at last gained the supremacy in the most civilized portions of the World. Both assume to trace their origin to the same ultimate source, Natural Law. The one bases the right to rule on divine selection and is commonly called the theory of the divine right. Persons of the other school affirm this tenure to rest on fraud and force. This other school of thought assumes the natural equality of men and bases the existence of all social institutions on some form of agreement. A differing conception as to the nature of this agreement divides the members of this latter school of thought into two classes, whose views pass respectively under the names, Divine Right, original compact and consent.

Divine right of sovereigns. The idea of divine right finds support in the scriptures and in the tradition of poets and the reasoning of Philosophers. The advocate of absolute power can point back to the very dawn of Grecian life, and from their hero poet quote the words of Nestor, rebuking the plebeian who raised his voice in opposition to the King: ''Be still, thou slave, and to thy betters yield; be silent, wretch, and think not here allowed that worst of tyrants, an usurping crowd. To one sole

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16 Holland, p. 26-37, quoted Keener's Sel. on Jur. p. 13.—1 Wilson 270. Marshall's view, Arguendo, Ware v. Hylton 3 Dall 211. Sir James McIntosh quoted. Dodge v. Woolsey, 18 Howe 331-75.

monarch Jove commits the sway. His are the laws, and him let all obey." Or, as put by another translator: "Ill for the common weal is the sway of many; let one man rule and be king alone; from Zeus he holds his office" (17). It is in Greece that we find the first struggle between these contending principles (18) and at a later period the same result is reached by a different process of reasoning by which natural law is substituted for the direct interposition of God.

Slavery affirmed to accord with natural law. Aristotle, the Greek tutor of Philip's son, Alexander the Great, said: "If the shuttle could weave by itself alone, one would not know what to do with slaves. The slave is the man of another. Do there exist men as inferior to

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17 Iliad, Book 1: "In a tragedy of Æschylus, the suppliants use this language to the King: 'Sir, you are the city and the public; you are an independent judge. Seated upon your throne as upon an altar, you alone govern all by your absolute commands.'" 1 Wilson's Works, p. 70.

18 "*The political era of the Iliad* is plainly fixed. It is the era of democracy lifting its head against nobility and hereditary rule. Thersites is the democratic agitator, hated by the bard who sings in royal or aristocratic halls, and who paints him a monster of ugliness most hateful to a race which adored beauty, as well as a paragon of moral vileness; exults in the chastisement inflicted on him, and makes the people sympathize with the chieftain who inflicts it, as he undoubtedly wishes the crowd in the agora would do. The passage is in spirit cognate to one in Theognis. It is not likely that the course of political events should have twice traveled the same round. The chiefs preside in the public assembly and lead, perhaps dictate, its councils; but there is a public assembly the need of popular assent is felt. Public opinion is repeatedly personified as in the *Iliad* II, 271: Telemachus in the assembly of Ithaca summoned by him makes a direct appeal to the people. All this bespeaks the transition from monarchy and aristocracy to democracy, such as the Greek colonies in Asia Minor evidently underwent, and probably from their maritime and adventurous character, their novelty, and the volatile spirit which in Herodotus they exhibit, more rapidly than it was undergone by the communities of old Greece." The age of Homer, Goldwin Smith, Am. Hist. Rev. Oct. 1901, p. 5.

other men as the brutes are? If they exist they are destined to be slaves. There are men who have hardly enough reason to understand the reason of others, and the corporeal labor is all they can produce; they are slaves by nature" (19). The right of the powerful to rule needed no further argument.

Consent and representation. The development of philosophy by other hands caused the Greeks to seek for a reason for all things, and to apply to all things the test of logical examination. This spirit of reasoning pervaded all subjects, and naturally spread to the problem of government and law as well as other subjects; questioned old notions; shook from its foundations the notion of ancestral right to rule (20); planted the germs of political thought, which bore the first fruit of popular government, taking actual form in a constitution and a government based upon the consent of the people, and whose sheet-anchor was the intelligence and morality of the people (21), for in the assemblage of the citizens (of Athens) vested the real political supremacy (22).

The principle of civic liberty—equality before the law—had been asserted. To the whole people had been confided the safety of the state and the supreme exercise of its laws (23). "The Athenian state was a community of citizens among which no single family or class could

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19 D'Lloys Philosophy of Right, vol. 2, p. 83-4.

20 Curtius' Hist. Greece, vol. 1, pp. 355, 356, 424, 425; vol. 2, p. 473; Gibbon's Decline and Fall, etc., 44.

21 Demosthenes' Third Phillipic; Curtius' Hist., vol. 1, p. 424. See Washington's first Message to Senate.

22 Curtius' Hist. Greece, vol. 1, pp. 355, 356.

23 Id.

assert particular rights or power. All the citizens were equal before the law; each possessed his civic franchise: . . . free speech before the court and in the assembled council of the people." Public courts protected citizens against officers. Personal liberty was guaranteed by right to give bail. "No law might be promulgated relating to a single individual without applying equally to all (24). These laws were put in writing to be read by all. They stood on pillars, and this was the Athenian popular government with a written constitution (25). "The good fortune of the Athenians consisted in this: that instead of their possessing an uncertain and formless idea of liberty, the liberty they desired was contained in their ancient and legally-established constitution" (26). "The admirable bearing of the Athenians is solely to be accounted for by the laws of Solon, which, through all the troubles of the times, had with invisible force educated the Athenians to a free citizenship resting on the foundation of morality" (27).

The Senate and Areopagus were representative of the people—changing bodies, checks upon each other, and also against popular passion (28).

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[24] Curtius, vol. 1, pp. 423, 424.

[25] B. C. 594.

[26] Curtius, vol. 2, p. 424.

[27] Id., pp. 423, 424.

[28] 1 Curtius, pp. 356, 357. Compare 1 Kent, Com. *232, and notes. The view of Professor Curtius is an extreme one and must be confined to the brightest period of Athenian law. The analogy presented by the ancient examples of representative government was of dangerous utility in argument favoring the formation and adoption of the present constitution. The authors of the Federalist were correspondingly careful in reference to the subject. See also Federalist, No. 63.

Thus, we see in the Grecian land two streams of law whose sources are each asserted to be in the fountains of nature; and, to take a simile from Bacon, "Like as waters do take tincture and taste from the soil through which they run, so do civil laws vary according to the region and governments where they are planted, though they proceed from the same fountains" (29). The one, flowing through a soil impregnated with Wisdom and Justice; the other, passing through a soil rich in Knowledge and Power, changing into a stream of Tyranny and Oppression.

The influence of this incipient Grecian philosophy concerning the equality of men as members of society and in the eye of the law never lost its hold upon this eastern society. Dynasties changed, the early kings were displaced by the emperors, and they in turn by tribunes who claimed to rule at the election of the people, and with their representatives the senate, but philosophy never wholly lost its influence, and forever kept the Roman state in a condition of conflict between those who would establish slavery and those who would maintain the dignity of Roman citizenship, the jus aequum of the Roman law.

This supremacy of the natural law is voiced by Justinian. It is reiterated by Blackstone; it is one of the foundation principles in that court of justice where conscience and equity are the ruling forces. But not until the levelling process of the Declaration of Independence and the establishment of the American Commonwealth

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29 1 Bacon's Works, vol. 1, p. 238.

was this principle of equal right made a foundation stone in the edifice of a Nation (30).

§ 15. **The Roman system—The law of nature.** As the Roman empire soon swallowed up the Grecian state, we naturally turn our attention to the Roman law.

Bacon (31) says that "the Decumvirs laws (the XII Tables) were laws upon laws not the original, for they grafted the laws of Graecia upon the Roman stock of laws and customs; but such was their success that the twelve tables which they compiled were the main body of the law which framed and wielded the great body of that estate" (32).

The law of nature.—Half a century before the Christian era, Cicero, the exponent of advanced thought in philosophy and law at Rome, declares that "Reason prescribes the law of nature and of nations; and all positive institutions, however modified by accident (33) or custom, are drawn from the rule of right, which Deity has inscribed on every virtuous mind" (34).

The translator of D'Lioy's Philosophy of Law says: "The extension of the original jus civile by the jus gentium did not change its character, and the jus naturale

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30 "But however great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements, there is still one aspect, in which all men in society, previous to civil government, are equal. With regard to all there is an equality in rights and obligations; there is that jus aequum, that equal law, in which the Roman placed true freedom." 1 Wilson's Works, 275.

31 Bacon's Works, vol. 2, p. 234; 1 Kent, Com. 52.

32 Compare Gibbon, Decline and Fall, ch. 44, and Professor Hammond's introduction to Sandars' Justinian.

33 Divine Right of Kings and Slavery.

34 Gibbon, Decline and Fall, ch. 44, p. 322.

was only an alien philosophical infusion introduced by Cicero and the jurists . . . from the schools of Greece" (35).

Sandars says: "By far the most important addition to the system of Roman law which the jurists (36) introduced from Greek philosophy was the conception of lex naturae. We learn from Cicero whence this conception came, and what was understood by it."

"With respect to the sources of Law the Romans had the following notions: every individual member of a political community is, as an animal, subject to the laws of Instinct; as a human being, to those which are dictated by the reason of mankind; and, lastly, as an individual member of a political community, to those laws which are sanctioned by the sovereign powers of that community. These three sorts of laws are respectively designated by the Romans jus naturale, jus gentium, sometimes also jus naturale and jus civile, in its most extensive sense. The proper source of this jus gentium is what in modern times is called the moral sense, or the natural feeling of justice; this, together with the moral notions at the time common to all nations, the Romans were not backward in recognizing as authority, although they did not feel themselves compelled to found their jus gentium wholly upon it. The jus gentium of the Romans,

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35 Translator's Preface, p. 11, Mackeldy says: "The scientific treatment of the law in the period (from Cicero to Alexander Servius, 50 B. C. to 250 A. D., p. 24) attained its *highest excellence*, which was particularly owing to the connection of law with philosophy and Greek literature." Introduction to Roman Law, p. 35.

36 Introduction to Sandars' Justinian, p. 15.

being dependent entirely upon natural feeling, did not rest upon any abstract principle. They did, however, recognize many principles as general rules, particularly the principle, that by the natural law all agreements should be observed, and that, in the absence of any special right, no one ought to enrich himself to the damage or from the property of another" (37).

§ 16. Slavery held contrary to the law of nature. The Institutes mark an important change of thought in regard to the origin of slavery. Lib. 1, tit. 2, sec. 2, says: "Wars arose, and in their train captivity and slavery, which is contrary to the law of nature, for by that law all men are originally born free." This doctrine is the direct opposite of the doctrine of Aristotle. The probable explanation for this change is the influence of Christianity and a consequently modified conception of the law of nature. Here then, in Rome, at the time of Justinian, the doctrine of the divine right of kings has given place to the principle that the people have, by a compact of submission, made over irrevocably to the emperor their whole power and authority, and the institution of slavery is ranked as a misfortune of war instead of the result of natural differences of capacity in human beings.

In August, 1774, James Wilson published his celebrated address to the colonists, wherein he denies the Jurisdiction of Parliament to legislate for the Colonies. In the course of his argument he says: "All men are by nature equal and free; no one has a right to any authority over

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[37] Thibaut's System Des Pandekten Rechts, Lindley's Translation, p. 23.

another without his consent; all lawful government is founded on the consent of those who are subject to it. Such consent was given with a view to ensure and to increase the happiness of the governed above what they could enjoy in an independent and unconnected state of nature'' (38).

§ 17. The origin of the compact theory. The source of power of the Roman emperor is worthy of remark. ''That which seems good to the emperor has also the force of law; for the people, by the lex regia, which was passed to confer on him his power, make over to him their whole power and authority'' (39). Gaius puts it thus: ''A constitution of the emperor is, etc.; . . . nor has there ever been a doubt as to this having the force of a lex, since it is by a lex that the emperor himself receives his authority'' (40).

This expression of Gaius differs from the idea of the divine right of kings; but the doctrine promulgated by Justinian that the people had surrendered, or made over to the emperor, all the power of the Roman people, the summi imperium, is very similar to what is called the original-compact theory of sovereignty (41); yet it recognizes compact as the true source of positive law (42),—compact of submission, it is true.

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38 2 Wilson's Works, 507. Compare this with the second clause of the Declaration of Independence.

39 Inst. 1-2-6.

40 Gaius, 1-4.

41 Inst. 1-2-6, Sandars' note.

42 Inst. 1-2-11. See also 1 Blk. Com., p. 237.

Spence, in his Equitable Jurisdiction, speaks of the origin of the theory of sovereignty as follows: "The reverence for the Roman law, which had been traditionally handed down through the clergy, independently of express adoption, must have operated to facilitate its being so largely resorted to when its stores were opened. The most remarkable feature is that it was taken as of imposing, if not of governing, authority, even on constitutional points. Glanville in his preface which is in part taken almost literally from that prefixed by Justinian to his Institutes, notices and explains the principle 'Quod principi placet legis habet vigorem,' as if he were commenting on the terms of an act of the English legislature. Bracton follows exactly the same course, fortifying the qualifications he introduces, not from national sources, but chiefly by references to other passages from the imperial laws. To this, namely, a reference to the Lex Legia and other imperial doctrines, says Mr. Allen (on Prerogative, p. 166), we may trace the old doctrines of absolute sovereignty and transcendent dominion which still disfigure our law books"(43).

§ 18. **Feudalism is in theory based on compact** (44). Feudalism as a political system was the successor of the Roman System and in as much as it became almost universal throughout Europe and was based upon an idea differing essentially from that of the Roman Law, and because further it has left indubitable traces upon our law, especially the law of land, it is important to all stu-

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43 1 Spence Eq. Jur. *123.

44 Consult Maine's Ancient Law, ch. IX, p. 365.

dents of our system that the fundamental ideas of feudalism be understood and it is not so difficult to understand if it is remembered that the warriors who followed the distinguished leaders in the inroads upon the Roman Empire and who subjugated it, were regarded as free men whom no leader however powerful, whether his name be Agamemnon or Attila, would have attempted, much less have succeeded in despoiling. It is this free spirit of individual liberty which is the characteristic feature of feudal civilization. It is the actual existence of the independent spirit which gives color to the forms of all political documents adjusting the relations between men in society. They take the form as they partook of the character of agreements between free-men. It should be remembered that the vassal was in truth a free man and that the peers of the realm were vassals. In the feudal political society, the basic idea of Right and Law takes on a new form. We have seen that in the Roman State, it was through the form of a public Law, the Lex Regia, that the people en masse made over to the Emperor their rights. It will be observed that the individual does not act in the individual capacity. In the feudal state, in fact and in form, the individual right is never lost sight of, the contract, the binding word is pronounced by the man to the Sovereign. The charters are signed by the Sovereign and run to individuals, though at times including classes. It is said by a recent writer, "That this contract idea is indeed to all the varying forms and transformations of the feudal age, the one thing which is permanent and distinctive, the one constantly controlling element."

. . . "Mr. Maitland admits, as fully as anywhere, the introduction at the Conquest of a contractual element which was lacking in Saxon days, but he is not disposed to see in this a matter of any importance. I shall not presume to dispute the opinion of so able a lawyer that as a matter of law the presence or absence of the contractual element is merely of theoretical and not of practical importance, that at most it is a question of legal logic, though I may be surprised that it should be so considered. But in the field of institutional history certainly the case is different. There the one vital fact is that at the beginning of English constitutional history, the public law of the state was brought under the controlling influence of private contract, that public duties were, as I have already said, transformed into private obligations. It was upon this idea that feudalism took its stand for self-defence against the attack of a powerful monarchy begun, indirectly and in ways not easily felt to be dangerous, by Henry II., continued more openly, so that the drift of things was more plain but not in reality more dangerous, by John. Forced into new prominence in this way as the principle of resistance, the idea of contract became the leading element in a new growth, the growth of the constitution, as I endeavored to show, too briefly, in an earlier volume of this review. (Vol. 5, p. 643-658.)

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Nor is this idea of contract a late idea, brought in as a theory to explain already existing facts. It goes back as a characteristic and controlling fact to days even before the origin of feudalism in one at least of the earlier in-

stitutions out of which the feudal system grew, the patrocinium; and it is only less prominent in the other, the precarium. In the patrocinium, which is the source of the personal side of feudalism, it was made especially emphatic (45). . . . This contract idea is, indeed, through all the varying forms and transformations of the feudal age the one thing which is permanent and distinctive, the one constantly controlling element'' (46).

§ 19. **Limitation upon the freedom of contract essential to liberty.** The student of politics will observe that this untrammeled right of contract led not only to extravagant political inequality but permitted individual servitude in no way distinguishable from slavery. Pollock & Maitland in their history of the Common Law say: ''We have been laying stress on the late growth of a law of contract, so, for one moment, we must glance at another side of the picture. The master who taught us that 'the movement of the progressive societies has hitherto been a movement from status to contract' was quick to add that feudal society was governed by the law of contract. There is no paradox here. In the really feudal centuries, men could do by a contract, by the formal contract of vassalage or commendation, many things that cannot be done nowadays. They could contract to stand by each other in warfare 'against all men who can live and die;' they could (as Domesday Book says) 'go with their land' to any lord whom they pleased; they could make the relation be-

[45] G. B. Adams in. Am. Hist. Rev. vol. VII, p. 30. See also Maine's Anc. Law, ch. 169 and ch. IX, p. 365.

[46] Id. p. 32.

tween king and subject look like the outcome of agreement; the law of contract threatened to swallow up all public law. Those were the golden days of 'free' (if 'formal') contract. The idea that men can fix their rights and duties by agreement is in its early days an unruly, anarchical idea. If there is to be any law at all, contract must be taught to know its place" (47). Spence also holds this view: "The Anglo-Saxon relation of lord and man was originally purely personal and founded on mutual contract, and perhaps the act of becoming the man of another or homage, then, as in aftertimes, was performed by the person simply declaring that he would be the man of the lord." . . . "As the relation was founded on contract, it might be accompanied, it would seem, by any conditions that were mutually agreed upon" (48).

§ 20. **Early limitations on absolute sovereignty—Magna Charta.** A few observations upon the Great Charter will bring out the relation of the people to those in whose hands were the reins of government. Of this charter Hoffman says: "Whatever obstructions the royal power found to its tyrannical exercise were opposed by its turbulent aristocracy. For this (the aristocracy) all the privileges, all the charters, all the limitations of prerogative were created; and during all these struggles the people, properly so called, were effectually out of view, because they formed no part of the political state. Even when provision was made against the tyrannical oppres-

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47 2 P. & M. Hist. Eng. Law (2d ed.) 232.

48 1 Spence, Eq. Jur. 36.

sion of the king, the very phrase shows the contemptibleness of the commons. 'Nullus liber homo,' says Magna Charta—a phrase so far from applying to the commons of England, or exhibiting any care for their rights, that it in fact concerned that class only which stood in contradistinction to the commonalty, liber homo meaning anything but those indigent and inconsiderable individuals from whom the English commons were afterwards to arise. It is true, indeed, that every subject of England at this day appropriates to himself the benign enactments of the charters and limitations of prerogative alluded to, and that Magna Charta is now a panoply to all; but we must look for the origin of this in times and causes much nearer our own day" (49).

This opinion, while not defensible to its full extent (50), contains a very salutary admonition, for the reason that a student is often misled to believe that by Magna Charta at a single stroke the people of England emerged from darkness into light, which is untrue, as at the time there were no commons (51). The people less in rank

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[49] Hoffman's Legal Outlines, p. 585.

[50] The Magna Charta brought back in some measure the golden time of the Confessor. It appeared to the barons that they could not expect the assistance of the people if, in treating with John, they should act only for their own emolument. They were therefore careful that stipulation should be made in favor of general liberty. The people were considered as parties to transactions which most intimately concerned them. The feudal rigors were abated, and the privileges claimed by the more dignified possessors of fiefs were communicated to inferior vassals. The cities and boroughs received a confirmation of their *ancient* immunities and customs. Provisions were made for a proper execution of justice, and in the restraints affixed to the power of the king and the nobility the people found protection and security. 1 Sullivan's Lectures, XX.

[51] Hale's Hist. Com. Law (Runnington ed.), p. 181, note.

than the barons had only such representation as allegiance to their lords gave them. It was a great limitation upon the powers of the crown, and did profess to secure, for every individual, protection of life and liberty, unless forfeited by due process of law, and, though obtained by the barons, expressly named the freemen and villeins. From that day the law of the land became a birth-right (the charter really restored the people to ancient rights), and in that sense Magna Charta was, and is, properly called the bulwark of English liberty. But what of the law itself, and what of the people?

The government was based upon the feudal system, with its idea of fealty; that is, the allegiance of one person to the person of another, or, stated simply, one man became the man of another. Its fiefs, subinfeudations, aids, escheats, wardships, marriage dues, cumbersome feudal tenures, obliterated almost entirely socage tenures (52). There was scarce a notion of the law merchant or equity. The people were the king's liegemen. Earls, barons, freemen and villeins were all the king's,—the lords bound to the king, the so-called vassals liegemen to the lords (53), and the villeins beneath the heel of all. It is not until after the establishment of the representation of the people through their especial representatives in a House of Commons that the people are confirmed in their liberties, both in person and property, by written limitation upon the prerogatives of the king.

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[52] Reeves' Hist. Eng. Law, p. 225, note.

[53] Reeves' Hist. Eng. Law, vol. 1, p. 469, note.

The Confirmatio cartarum. There were a great many confirmations of the great charter but the final one is generally spoken of (54). This took place by the act of the twenty-fifth year of Edward the First, and commonly called "Confirmatio cartarum," being the year 1297. This statute gave the same security to private property which had been given by Magna Charta to personal security; for while Norman kings had always renounced any right to raise a revenue by taxation, the matter did not become a constitutional limitation upon the king until

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54 "The great charter was always regarded as a fundamental law; but as the English monarchs were constantly disposed to evade it, the barons and the people repeatedly claimed its confirmation from their sovereigns. No fewer than thirty-eight solemn ratifications of it are recorded; of which six were made by Henry III., three by Edward I., fifteen by Edward III., six by Richard II., six by Henry IV., one by Henry V., and one by Henry VI. The Charter received a few alterations upon its successive confirmations in the first, second and ninth years of Henry III.'s reign, the last of which is in our statute book and has never received any alteration. The most important change in the Charter, as confirmed by Henry III., was the omission of the clause which prohibited the levying of aids or escuages without the consent of Parliament. But though this clause was omitted, it continued to be observed during the reign of Henry, for we find the barons constantly refusing him the aids or subsidies which his prodigality was demanding. But he still retained the right of levying money upon towns under the name of tallage, and also claimed the right of levying upon contributions, such as upon the export of wool. But a *final stop was put to all these exactions by the celebrated statute passed in the 25th year of the reign of Edward I., entitled Confirmatio Cartarum.* This statute not only confirmed the Great Charter, but gave, to use the words of Hallam, "*the same security to private property which Magna Charta had given to personal liberty.*" In it the king solemnly declared that "for no business from thenceforth we shall take such manner aids, tacks, nor prises, but by the common consent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed." Thus was the great principle of parliamentary taxation explicitly acknowledged eighty years after the first enactment of the Great Charter." The Students' Hume, p. 154.

after the Confirmatio cartarum, which expressly put that right in the hands of the Commons, or at least in the hands of Parliament (55).

§ 21. **The representation of the people.** The Commons, it must be recollected, is the only representative body in the English constitution (56), the King being the supreme executive, the Lords representing no one—simply acting for themselves,—and the Commons, who were formerly knights of the shire and representatives of the boroughs, represented the people of their vicinity or territory (57).

Rise of the House of Commons. The establishment of the representative principle by the admission of this representative body into the great council of the nation is not to be taken as the consummation of liberty; much less is it the establishment of the true principle upon which the science of politics is supposed to rest, viz.:

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55 The first parliament in which people had representatives was in 1265. 2 Reeves' Hist. Eng. L. (Finlason 'ed.') 350 note. There is said to be earlier traces of the Commons, but the form is quite obscure. Freeman's William the Conqueror, p. 157; Argument of Cliffin in Burdett v. Abbott, 4 Taunt, 403; 1 Coke, I, 62 note. The forty-ninth year of Henry III, and the twenty-third year of Edward I, which so many writers consider as the dates of the establishment of the Commons, were of consequence nothing more than memorable epochs in their history. The first summons of knights on record is supposed to be in the twenty-ninth year of Henry III. But this, though it were true, does not prove that knights were not known until that time. The writ does not say so; nor can it be gathered from it that *knights of the shire* were then *newly* established. If there remained, indeed, an uniform series of records from the earliest times in which there was no mention of *knights* till the age of Henry III, there might thence arise a strong argument against their antiquity. But this is not the case; and it happens that in the fifteenth year of King John there is a writ to the sheriff to summon FOUR *Knights of the county.* 1 Sullivan's Lectures, XXII.

56 1 Wilson's Works, 389.

57 See Webster's arg. in Luther v. Borden, 7 How. 1.

Equality before the law. It is but a step of ground gained in the struggle (58); the liberation of a force which had before been guided by one or other of the contending powers; the creation of a new estate which was destined ere long to curb the power of both. No more than the establishment of Protestantism established religious freedom did the Commons establish civil or political liberty, the rational principle of which was then unknown, or at least disregarded (59).

§ 22. **The divine right of sovereignty revived in England.** The next step in the orderly progress of the investigation brings us to an examination of the principles of law, right and government which obtained in Great Britain at the time when the separation took place between the Colonies and the Mother Country, and it will

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58 See Stubbs' Hist. Eng. ch. XIV. "The Confirmatio cartarum did not need the executory provisions of the charter of John. It rested not only on the word of a king, who might be trusted to keep his oath, but on a full resolve of a nation awake to its own determination. The king has taught in the plainest terms the principle by which the nation binds him—'that which touches all shall be allowed of all;' the law that binds all, the tax that is paid by all, the policy that affects the interests of all, shall be authorized by the consent of all. From the date of that great pacification, party politics take new forms." 2 Stubbs' Con. Hist. of England, p. 5.

59 As an example of their idea of liberty note the followng: "By a very hard statute in the 12th of Richard II, no servant or laborer could depart, even at the expiration of his services, from the hundred in which he lived, without permission under the king's seal. Nor might any who had been bred to husbandry till twelve years old exercise any other calling. A few years afterwards the Commons petitioned "*that villeins might not put their children to school in order to advance them by the church, and this for the honor of all the freemen of the church.*" These petitions against emancipation and progress are followed by others equally drastic in their terms and scope. Hallam, Middle Ages, ch. VIII, part III.

suffice our purpose to deal with the period intervening between the time of Elizabeth and the separation of the American colonies from England.

On the basis of the regal authority exercised by the crown of Great Britain, Lord Bacon says, speaking of the time of James I (60): "But I demand, Do these officers or operations of law evacuate or frustrate the original submission, which was natural? or shall it be said that all allegiance is by law? No more than it can be said that 'potestas patris,' the power of the father over the child, is by law; . . . yet no man will affirm that the obedience of the child is by law, though laws in some points do make it more positive; and even so it is of allegiance of subjects to hereditary monarchs, which is corroborated and confirmed by law, but is the work of the law of nature, and therefore you find the observation true . . . that law-givers were long after their first kings, who governed for a time by natural equity without law." He concludes: "I shall hardly consent that the king shall be called only our rightful sovereign or our lawful sovereign, but our natural liege sovereign, as the acts of parliament speak; for, as the common law is more worthy than the statute law, so the law of nature is more worthy than them both."

His treatment of the subject of government is equally characteristic. He says: "Concerning government, it is a part of knowledge, secret and retired in both these respects in which things are deemed secret; for some things are secret because they are hard to know, and some because they are not fit to utter" (61).

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[60] Argument on Post Nati of Scotland. Works, vol. II, p. 169.

[61] 1 Bacon's Works, p. 238, "Advancement of Learning."

We are told by Blackstone that the glorious Queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state; and it was the constant language of this favorite princess and her ministers that even that august assembly ought not to deal, to judge or to meddle with her majesty's prerogative royal; and her successor, James I, who had imbibed high notions of the divinity of sovereignty, more than once laid it down in his speeches that it is assumption and blasphemy in a creature to dispute what Deity may do; so it is presumption and sedition in a subject to dispute what a king may do in the height of his power. "Good Christians," he adds, "will be content with God's will as revealed in his Word (62), and good subjects will rest in the king's will as revealed in his law."

Blackstone himself, writing over a century and a half later, of course does not expressly adopt the theory of divine right, but says: "The subject was ranked (in the time of Elizabeth and James) among the Arcana Imperii, and, like the mysteries of the bona dea, was not ever to be pried into by any but such as were initiated into its service; because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry" (63).

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62 Probably as expounded in the Westminster Confession of Faith, prepared under his direction.

63 Blk. Com. *238. Prof. Hammond, in his edition of the Commentaries, says: "But Blackstone could not, consistently with his political beliefs, accept the doctrine of divine right as the basis of the state's power to command in things morally indifferent. He had to seek some other source of the laws which prohibited things not mala in se. Here he seems to be open to criticism for the lack of precision and uncertainty

It is quite evident that, notwithstanding Magna Charta, the science of government had not, at the time of Lord Bacon, taken any great strides forward.

Professor Dicey says of Blackstone's treatment of sovereignty: "The book contains much real learning about our system of government. Its true defect is the hopeless confusion, both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit—common to all the lawyers of his time—of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional king the whole, and perhaps more than the whole, of the powers actually possessed and exercised by William the Conqueror" (64).

§ 23. **Constitutional conventions in England. Transfer of allegiance.** The interruption of the hereditary dynasty of England by the commonwealth illustrates the desirability of providing in a constitution orderly methods for changing it.

Sir John Dalrymple says of the trial of Charles I: "The republican and puritanical Commons, with a democratic spirit, brought their sovereign, under the forms of justice, like a common member of the community, to a public trial and a public execution. With the same leveling

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in his views. He falls back on *compact*, without apparently perceiving the inconsistency between this doctrine and his definition, an inconsistency of which his first American critic, Wilson has made effective use, showing that Blackstone's definition ranked him, in spite of himself, with the supporters of divine right and absolute power." Hammond's Blackstone, p. 111, note.

[64] Dicey's Law of Const., 7.

hand they laid the peerage, the church, the parliament, and the law itself, in the dust." The orderly course of affairs being interrupted and the crown deposed, it devolved upon the people to determine upon the course to be pursued. The assemblages of the national council of this period are therefore called convention parliaments.

The doctrine of divine right of kings expired with Charles I. It was opposed to all traditions of Saxon or Norman England. It has historical interest now as illustrating the extravagant claims men will make in order to accomplish political designs.

The restoration of Charles II, and the abdication of James II, are simply illustrations of the chaos into which the system of English constitutional law had drifted. The parliament which placed King William on the throne and fixed limitations on the prerogative presents the peculiar spectacle of the English people, in convention assembled, engaging in great and original acts of political legislation without the presence of the sovereign.

By Blackstone and other theoretical writers the commonwealth is not recognized as a lawful government; but that government which exists is the lawful if not the rightful government.

Very naturally, James Wilson, in his speech in vindication of the colonies in 1775, inquires, "Was the convention of the Barons at Runnymede authorized by the forms of constitution? Was the convention of Parliament that recalled Charles the Second and restored the monarchy authorized by the forms of the constitution? Was the convention of Lords and Commons that placed King Wil-

liam on the throne authorized by the forms of the constitution?''

Notwithstanding the arguments of courtiers and partisans, who, by sophistry and reasoning, change conquest into succession, or a contract into submission to a natural lord, the historical fact remains that Charles the Second became king of England by the consent of the English people; likewise William IV. The whole error of the Tory party in England at the time of the American Revolution consisted in basing the powers of government upon a theory of sovereignty which had no place in their system. The main body of the English people never assented to this view.

§ 24. The questions of the American Revolution. The controversy between the American colonists and Great Britain, which resulted in their final separation, related entirely to theories of constitutional law or politics.

The question arose in a threefold aspect: First. The nature of the bond between the subject and the crown, involving the extent of the king's prerogative. Second. The nature of the modes of acquisition by which the subjects had acquired the territory embraced within the boundary of the several colonies. Upon this depended the question as to whether the colonists were entitled to the privileges and immunities of the common law as colonists, or whether they occupied the servient position of a conquered people. Third. Really depending upon and involved in the second, the right of the British parliament to legislate for the colonists, or to bind them by legislation.

These questions, it will be seen, relate to two entirely distinct branches of governmental authority, viz.: the king as king, and the parliament as the great legislative body of the kingdom.

The question of religious toleration dropped entirely out of view. Representation in legislation as a means of assenting to law took the paramount place.

The native-born American citizen, looking back at the century which has passed, sees the constant and almost frictionless operation of these organized bodies, all operating together to make up the system of government, which has enabled the United States to attain such preeminence among the nations of the world and to exercise so great an influence upon other countries. Because of this experience the native-born citizen looks upon our governmental arrangement as so simple and natural as to involve no peculiar principle and to require no unusual condition, and the majority of the foreign-born inhabitants wholly overlook these essential things. The truth is that the stability of the whole system depends upon a few simple principles and upon conditions, the absence of which would render its preservation impossible.

That condition of the public mind which could perceive and avow equality and dispense with sovereignty, and which impelled the more opulent and prosperous men to renounce the enjoyment of their position and imperil their lives and fortunes in order that the principles they believed in should find actual application in the ordinary affairs of life, involves two things, as essential to the preservation of the American system of government and law

as are light and heat to the growth of plant life, viz.: intelligence and integrity. The Revolutionary War was undertaken solely to maintain a sentiment and a principle. The affirmation of equality was not made at the beginning.

§ 25. **The fundamental principles of government in the United States.** The history of the American people as well as that of their British ancestors, indicates more powerfully perhaps than that of any other country the extraordinary weight attached to a theory or to principles. The burdens of taxation were removed by Parliament, but the same declaration which removed the material burden was accompanied by the declaration of a political principle, namely, that Parliament had the power to legislate on all matters whatsoever.

Edward Everett, in an address at Cambridge on the fiftieth anniversary of the Declaration of Independence, said: "The oppressions which aroused them had assumed, in their day, no worse form than that of a pernicious principle. No intolerable acts of oppression had ground them to the dust. They were not slaves, rising in desperation from beneath the agonies of the lash, but free men, snuffing from afar 'the tainted gale of tyranny.' The worst encroachments on which the British ministry had ventured might have been borne consistently with the practical enjoyment of many of the advantages resulting from good government. On the score of calculation alone, that generation had much better have paid the duties on glass, painters' colors, stamped paper and tea than have plunged into the expenses of the Revolutionary war. But

they thought not of shuffling off upon posterity the burden of resistance. . . . The British ministry, at that time weaker than it had ever been since the infatuated reign of James II, had no knowledge of political science but that which they derived from the text of official records. They drew their maxims, as it was happily said of one of them that he did his measures, from the file. They heard that a distant province had resisted the execution of an act of parliament. Indeed! and what is the specific in case of resistance? A military force—and two more regiments were ordered to Boston. Again, we hear that the general court of Massachusetts Bay has taken counsels subversive of the allegiance due to the crown—a case of a refractory corporation. What is to be done? First try mandamus; and, if that fails, seize the franchises into his majesty's hands. They never asked the great questions, whether nations, like man, have not the principles of growth; whether Providence has assigned no laws to regulate the changes in the condition of that most astonishing of human things, a nation of kindred men. They did not inquire, I will not say, whether it was rightful and expedient, but whether it were practicable, to give law across the Atlantic to a people who possessed within themselves every imaginable element of self-government" (65).

The American colonists claimed the British Constitution as their birth-right and that so long as they themselves as British subjects had gone forth conquering and to conquer, that Constitution went with the flag whereso-

[65] Am. Oratory, pp. 452, 453.

ever they carried it. In studying national institutions there is no one thing so important as to begin with the fundamental first principles upon which the whole structure is founded and which ramifies to its remotest parts. The expression of that principle is familiar to every school-boy, but its real importance is not appreciated by the American people and it is safe to assume that it is violated more often by those who exercise the trust of legislation than by any other class of citizenship. Equality of Right is the first principle of American Jurisprudence. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable (66) rights, and among these are life, liberty and the pursuit of happiness; that to secure these rights Governments are instituted among men deriving their just powers from the consent of the governed." "Our government," says Judge Dillon, "state and national, embodies and rests upon the fundamental principle of the absolute and essential civil and political equality of all its citizens, whose collective will, expressed by majorities, is the rightful and only source of all political power. By this principle we must stand or fall. In adopting it, we reversed the doctrines of the governments of continental Europe, which doctrines were 'that all popular and constitutional rights, all useful and necessary changes in legislation and administration, can only emanate from the free will and concession of the monarch or instituted government' " (67).

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[66] The compact of servitude is no longer permissible; one man cannot *voluntarily* become a slave.

[67] Dillon's Laws and Jurisprudence, p. 144.

As we have seen the germ of these political ideas took root in the human heart centuries ago, but they had lived with the cloister and the scholar, they had cast a feeble, fitful gleam of light over an ancient people, but they became, to change the metaphor, the chief corner-stone of a political structure for the first time in the United States. The Declaration of Independence is not a part of the written Constitution of the Nation, but the principles declared in this Declaration of Equality are parts of the Written and Unwritten Constitution of the People, and are everywhere treated as practical principles, and not, as many Americans supposed, mere glittering generalities to embellish Fourth of July orations or post-prandial festivities. In an address at Cambridge, July 4th, 1826, Edward Everett said, and truly, "that till the establishment of the American Constitution this question (the basis of government) had received but one answer in the world, I mean but one which obtained for any length of time and among any numerous people, and that was force. Looking upon the Declaration of Independence as the one prominent event which is to represent the American system—and history will so look upon it—I deem it right in itself and seasonable this day to assert that while all other political revolutions, reforms and improvements have been in various ways of the nature of palliatives and alleviations of systems essentially and irredeemably vicious, this alone is the great political discovery in political science, the Newtonian theory of government, for which wise men and sagacious statesmen in other times had strained but without success. I speak the words of truth

and soberness, without color or exaggeration, when I say that before the establishment of our American Constitution, this Tory doctrine of the divine right was most common, and this Whig doctrine of the original contract was professedly the most liberal doctrine ever maintained by any political party in any powerful state. I do not mean that in some of the little Grecian republics, during their shortlived noon of liberty and glory, nothing better was practiced,—nor that, in other times and places, speculative politicians had not, in their closets, dreamed of a better foundation of government. But I do mean that, whereas the Whigs in England are the party of politicians who have enjoyed, by general consent, the credit of inculcating a more liberal system, this precious notion of the compact is the extent to which their liberty went. It is plain, whichever of these solemn phrases, 'divine right' or 'original compact,' we may prefer to use, that the right of the strongest lies at the foundation of both in the same way and to the same degree.''

On several occasions recently the courts of last resort have used as the foundation of their decision the Declaration of Equality, treating it as a limitation of the powers of government and a safeguard of the immunities guaranteed by the Constitution (68).

§ 26. **Preservation of equality is the chief concern of government and people alike.** The province of an institutional writer is no doubt that of setting forth the fundamental features of the system of law which he treats, but

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[68] Allgeyer v. La., 165 U. S. 578; State v. Kreutzberg, 114 Wis. 530, 91 Am. State 934; Bessette v. The People, 193 Ill. 334, 56 L. R. A. 558.

it is also his privilege, perhaps his duty, to point out the tendencies to drift away from and violate fundamental principles of government. Conditions as they exist in the United States, rightly viewed, cause the publicist mingled feelings of apprehension and confidence (69). Among a free people there is always a tendency to violate in some manner the equilibrium which our primary axiom has declared to be essential to liberty, and the idea sought to be communicated can perhaps be best communicated by resort to example and admonition, leaving the application to those who desire the perpetuity of this Nation.

§ 27. Intelligence and integrity essential to liberty and law. Very aptly may a parallel be drawn between the cause of the downfall of Athens and the vulnerable point in our own scheme of self-government; if it fails, it must be through the degenerating influence of a blunted morality. In the third Philippic, Demosthenes said: "But what is the cause of the mischief? There must be some cause, some good reason, why Greeks were so eager for liberty then, and now eager for servitude. There was something, men of Athens (70), something in the hearts of the multitude then, which there is not now, which over-

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[69] The President's thanksgiving proclamation (1905) wisely admonishes the people as to a danger never greater in any nation in the world. "We live in easier and more plentiful times than our forefathers, the men who with rugged strength, faced the rugged days; and yet the dangers to national life are quite as great now as at any previous time in our history. No other people has ever stood on as high a level of material well being as ours now stands, we are not threatened by foes from without. The foes from whom we should pray to be delivered are our own passions, appetites and follies; and against these there is always need that we should war."

[70] This expression, "Men of Athens," cited 2 Dall. 472.

came the wealth of Persia and maintained the freedom of Greece, and quailed not under any battle by land or sea, the loss whereof has ruined all and has thrown the affairs of Greece into confusion. What is this? Nothing subtle or clever; simply that whoever took money from aspirants for power, or the corruptors of Greece, were universally detested; it was dreadful to be convicted of bribery." . . . "But now all such principles have been sold, in open market, and those imported in exchange, by which Greece is ruined and diseased, what are they? Envy when a man gets a bribe, laughter if he confesses it; mercy to the convicted; hatred to those that denounce the crime, —all usual attendants upon corruption."

The senate replied to the first inaugural of Washington: "We feel the force and acknowledge the justness of the observation (of Washington) that the foundation of our National policy should be laid in private morality."

Still more to the point is the warning of that grand old patriot who, amid the storm of public strife and private threat which characterized the period of the Revolution, maintained the principles of Liberty.

The second president, in his inaugural address, after reviewing the first years of the republic and the pleasing spectacle presented by the nation, thus reads the signs of the times: "In the midst of these pleasing ideas, we should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties if anything partial or extraneous should infect the purity of our free, fair, virtuous and independent elections. If an election is to be determined by a majority of a single vote, and that can be

procured by a party through artifice or corruption, the government may be the choice of a party, for its own ends—not of the nation for the national good. If that solitary suffrage can be obtained by foreign nations by flattery or menaces; by fraud or violence; by terror, intrigue or venality, the government may not be the choice of the American people, but of foreign nations. It may be foreign nations who govern us, and not we, the people, who govern ourselves. And candid men will acknowledge that, in such cases, the choice would have little advantage to boast of, over lot or chance."

Justice Miller thus expresses the same thought: "In a republican government like ours, where political power is reposed in the representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics; and though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources" (71).

§ 28. **Distinctive features of American law** (72). The following provisions of the American system of law are the great fundamental points in which it differs from any other government established anterior to the American Revolution (73):

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[71] Ex parte Yarbrough, 110 U. S. 652-666.

[72] As these features must be treated in logical order the citation is in the main reserve.

[73] The ideas of consent and representation were not new, both being in theory present in the British Constitution, though hampered by the absence of equality.

The establishment of equality before the law of persons subject to it.

Religious freedom.

No power can be exercised as of a personal right (in truth a mere corollary of the above).

Limitations are set upon all powers.

The creation of a jurisdiction to test all acts by the supreme law with the power to declare void and of no effect any act of any department or officer of government contravening that law (74).

The division of governmental functions and political sovereignty by subjects so that the national law and the state laws operate directly upon the individual. (Baldwin's Modern Political Institution, p. 12.)

In these respects the people of the United States ventured beyond the limits of precedent and founded a new system of government based on their peculiar conceptions of Right, Law and Government (75).

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74 See Harvard Law Rev. vol. 7. No. 3, p. 130, Nov. 1893.

75 Prof. Leiber affirms that this is the first instance in history of a government balanced in this way. Leiber, Liberty and Self Govt., 258.

CHAPTER III.

FORMAL JURISPRUDENCE.

§ 29. The practical utility of technical and formal jurisprudence. Every branch of learning, every department of trade, every vocation, has its own peculiar vocabulary, its terms of art as they are called. It is only by the use of words that the ideas involved in a discourse can be communicated.

It is astonishing how few great leading terms are necessarily used even in the largest and most minute discourse. These leading terms express the substantive ideas which constitute the woof of the finished fabric. They are bound together by the warp of verbs, conjunctions and prepositions and embellished and given shades of meaning by adjectives and adverbs. The bulk of any discourse must be in words familiar to us all.

Apply this to the subject of law and it becomes plain that nearly all of its ideas cluster round such leading terms as Right, Duty, Obligation, Wrong, Injury, Person, Status, Thing, Property, Estate, Title, Action, Remedy, Justice, Equity, Law, Government, Agreement, Contract, etc. The ideas these words stand for—that is, what is the technical definition of each in the peculiar field of law—is what is meant when it is said: "The Jural con-

ception of this or that word is," etc.; that is, its meaning in law.

The first practical function of jurisprudence then is to ascertain the meaning of such words and ascribe that definite meaning to them. If the hundred pages which followed had no other function and performed no further service, they would be worthy of a careful preliminary perusal and frequent study in connection with the special topics.

But formal jurisprudence performs another service equally important, equally useful and absolutely essential to simplicity, viz.: to give order and proportion to the treatment of the law.

By means of the visible outlines created by this process, the student sees on a single page the map of the whole field he is to cover and the explanation of these necessarily puts him in possession of the fundamental principles of that part of his subject.

Scientific jurisprudence is a subject of wide range and of great depth wherein is found much conflict of opinion among jurists and scholars, all of whom are entitled to respectful consideration.

The author's views are the result of the careful study and deliberate consideration over a period of many years of all such learning as his research discovered. These views have been expressed plainly, but it is hoped not dogmatically, and in the light of several years' criticism it is believed that the conclusions find the approval of our best scholars.

Brief as the presentation is, yet it is believed to contain the essential ideas and doctrines which make up the substance of the best books on jurisprudence. In it will be found quite a sufficient list of books to enable the more earnest to make exhaustive study of ancient and modern systems. The theories of Jurisprudence are all displayed, the leading terms of the law defined and the various systems of classification and legal exposition more fully treated than elsewhere.

§ 30. **Jurisprudence defined.** "The term jurisprudence, like every other important term which takes its hue from the whole complex life of mankind, is ever needing to be defined afresh in the ever new language of each succeeding age" (1).

It has frequently been defined.

All jurists agree that we are indebted to the Romans for the beginning of the scientific treatment of the law and—

In the Institutes Jurisprudence is defined as "the knowledge of things divine and human, the science of the just and the unjust" (2).

Since that definition was formulated, the meaning of the word "jurisprudence" has gone through several mutations, until now it has come to signify to us merely the science of human law, and to include within it everything within the domain of law (3).

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1 Amos' An English Code, 206.

2 Inst., 1. 1.

3 Heron Jur. 66; 1 Austin Jur. 176; Dillon Law and Jur. 21.

Heron's definition is, "Jurisprudence is the science of positive law, the art of legislation, and the practice of law" (4).

Mackeldy's, "The science of compulsory law with their reasons and sources combined with their philosophy and history. The simple knowledge of laws without these lacks the scientific requisite of jurisprudence" (5).

"As a science, jurisprudence is analytical; that is to say, it deals with the various relations which are regulated by legal rules, rather than with the rules themselves, abstractly speaking" (6).

Jurisprudence is a science which embraces not only a view of positive law and government as they exist in any particular system, but embraces the theories upon which private rights depend, and upon which governments and nations are builded. It bears "very intimate relation to the progress of civilization, and the study of one must embrace the other" (7). It is not the same as moral philosophy, although moral philosophy is one of the basic principles of jurisprudence. It is a broader term than political science in this; that jurisprudence must descend to and treat specific rules of private right (8).

The modern tendency to specialize has introduced some confusion of thought by engendering the idea that

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4 Jurisprudence, p. 66; Austin's Jur. vol. 1, p. 176.

5 Mackeldy's Roman Law, p. 3.

6 Holland's Jurisprudence, p. 5.

7 See Gibbons' Decline and Fall, ch. 44.

8 Warren's Law Studies, 167-9. See Am. Bar Assn. Rep. 1902, p. 437, et seq.

Political Economy, Sociology, Political Science, etc., are independent topics, whereas they are respectively only names for different view points of what is intrinsically one integral whole which may with sufficient accuracy be termed the science of law and government.

Professor Hastie makes this fact quite clear: "The Philosophy of Law, after many deviations, has again come upon the right path; it has its sphere of activity in the midst of what is positive; it has entered into the fresh moving life of the time. It has to reconcile what exists with the demands of reason 'to recognize the rose in the cross of the age.' It has accordingly even changed its name, and in virtue of its giving regard to experience it has been designated 'Philosophy of Law and Politics,' or Philosophy of Law and Comparative Jurisprudence. . . . The Philosophy of Law is not to be regarded as a special science. As soon as it is seen that the Philosophy of Law has no other function than the spiritual permeation of Positive Law, the contrast between Philosophy of Law and the science of Positive Law disappears, for their contents are really the same. From this standpoint Jurisprudence is generally represented in the present work, as the science of Law rather than the science of Right, but the correlative principles of Right are always presupposed, even when they are not overtly expressed in the more concrete current terminology of Positive Law" (9).

Inasmuch as some definite limits must be set to this subject, for our purposes, jurisprudence may be regarded as

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9 Hasties' Outlines of Jur. 175-6.

a practical although a metaphysical science, and as bounded by the terms, the science of law and government, and confined in application to human laws. It is, however, a historical science, and consequently not confined to an investigation merely of what is the law, but what its development has been, and why and how existing things came to be. Law cannot be treated intelligently apart from jurisprudence. Jurisprudence is not a practical science apart from law. Jurisprudence may not be apparent on the surface of a legal treatise, but should pervade and control the arrangement and treatment of legal subjects.

Resolved into its component elements all of the following may be perceived. First. Jurisprudence is a science. Second. It is an historical science because it must discover the origin and growth of legal ideas and institutions. Third. It is a moral science because it must deal with moral philosophy. Fourth. It is a logical science because one of its main functions is to give logical form to the mass of law which would otherwise be unmanageable.

There is no tribunal with power to fix the meaning of this word; each author must therefore be left to state his conception of the subject. In this treatise it is not proposed to treat jurisprudence abstractly, but to use the science in connection with the system of municipal law which obtains in the United States. The jurisprudence with which we deal is jurisprudence applied, the practical science of law which gives simplicity, order and homogeneity to the corpus juris.

§ 31. **Classification the essential process of jurisprudence.** Truth is frequently veiled by forms of expression and this word, jurisprudence, has become almost mystical and by many regarded as of merely theoretical or academic value.

Jurisprudence is a science, and in its practical operation it involves several processes, each made the name of a distinct mode of investigation, viz.: Historical jurisprudence or the search for the origin and growth of legal facts and social institutions. Analytical or logical jurisprudence is the process of creating a formal system of law. This is always a logical process, of which classification is the means, the formal arrangement the end. This process is not confined to legal subjects, but dominates all the sciences.

The origin of modern sciences is well described as follows: "The progress from the aimless observation of individuals to a system consists in this, that an order was introduced and applied in which these separate observations supplemented and checked one another, but the individual systems themselves still stood in chaotic confusion beside one another. An individual was needed to introduce order here, too. An individual framed, out of the many ideas concerning politics, science, jurisprudence, medicine, astronomy, mathematics, philology, a new and great conception—SCIENCE. We know this individual, and his divine name, Plato, and we know, too, the man who with tremendous energy undertook the task of carrying out the new programme, who first created a system of separate sciences, a classification of human knowledge, Aristotle."

Falck, a great German jurist, says: "Science in the objective and universal meaning of the term, designates a body of truths methodically arranged (10). The sciences are divided theoretically into several branches or departments, according to the different objects of knowledge with which they deal. . . . In this way the sum of knowledge which relates to right and law practically constitutes the special science of jurisprudence."

"Three things are requisite in order that the representation of the rules of law recognized in a country may really deserve the name of a science. First, the principles of right and law must be so completely treated that no jural relation shall remain unexplained, at least in its essential points. Second, the grounds upon which the jural truths rest must be convincingly developed. Third, and finally, the arrangement of the whole system must be carried out, even in its individual parts, according to the principles of its internal essential connection, and not in accordance with an arbitrary scheme. The

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10 *Classification is eminently practical.* The daily work of the practicing lawyers who conduct litigation is made up largely of the analytical processes of differentiation and classification—of the facts to reach those which are elemental—of the cases to explain apparent conflict. "Every well-trained lawyer," says Carter, "will assent to the observation that in cases of difficulty the first necessity is to devote the closest attention to the facts of the transaction. In the great majority of cases this method will solve all difficulties. This is because the law is a science, consisting in the observation and classification of human transactions. The principles of the classification, —the scientific order—that is, the law,—already exists. The task is to ascertain the true features of the fact or groupings of fact and, when this is done, the transaction seems, as it were to arrange itself in its appropriate class." Jas. C. Carter, Province of the Written and Unwritten Law, Va. Bar Assn. Rep. 1889, p. 44. See also Holmes' Remarks, 10 Harv. L. Rev. 474 et seq.

essential character of the system consists in the union of these three qualities: Completeness, depth or fundamentalness and order."

The Utility of Analysis. Dr. Holland says: "The ever-renewed complexity of human relations calls for an increasing complexity of legal detail, till a merely empirical knowledge of law becomes impossible. The evil has been partially remedied by the formation of codes, by means of which legislators, more or less imbued with legal principles, have grouped the legal chaos under genera and species. But an uncodified system of law can be mastered only by the student whose scientific equipment enables him to cut a path for himself through the tangled growth of enactment and precedent, and so to codify for his own purposes. In this as in other departments of knowledge, the difficulty of the subject is due less to the multiplicity of its details than to the absence of general principles under which those details may be grouped. In other words, while legal science is capable of being intelligently learned, isolated legal facts are capable only of being committed to memory" (11).

§ 32. **Practicability and difficulty of analyzing our law.** The remark of Sir William Jones "That if law is a science it must be founded on principle," is obviously true, or law is simply an art (12). Being founded upon principle, and being also a science, the rules of law must be susceptible of some logical arrangement, and that arrangement must be the result of analysis.

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11 Holland's Jurisprudence, p. 1.

12 Jones on Bailments.

Lack of Attention to Method in Text-Book. We have many text-books which are methodically arranged, nevertheless it is equally true that, until recently, there has never been accomplished a tolerably fair arrangement of the whole body of American law.

Sir Montague Crackenthorpe, an English scholar and teacher of law, in an address before the American Bar Association, said: "As is the common run of legal practitioners, so is the common run of our legal text-books. We have in our libraries a number of monographs, dealing with the sub-heads of law in minute detail—books on torts and contracts, on settlements and wills, on purchases and sales, on specific performance, on negotiable instruments, and so forth. We have also many valuable compendia, or institutional treatises, dealing with the law as a whole. Each and all of these bear witness to the disjointed character of our jurisprudence. The numerous monographs overlap and jostle each other, like rudderless boats tossing at random on the surface of a wind swept lake. The institutional treatises, in their endeavor to be exhaustive, fail in point of logical arrangement, as vessels overladen with a mixed cargo fail to get it properly stowed away in the hold. Some day, perhaps, we shall produce a Corpus Juris which will reduce this legal wilderness to order. But if we would lay bare the living forest we must first grub up the decayed trees" (13).

[13] Sir M. Crackenthorpe, Am. Bar Assn. Rep. 1896. See Walker's Am. Law, p. 4. There is a reason for this lack of a thoroughly scientific institutional work, and the author conceives it to be this: Until after the Civil War, no analysis which assigned the relative positions of the nation and the state as they are now fixed could have been acceptable, and while so great a question remained a vexed one it was a great impediment to such a treatment.

As a consequence a confusion has crept into our text writings; for instance, one writer takes for the title of his work "Constitutional Law." We are led at once to inquire what will be the subjects embraced within that volume and what will be excluded. Our constitutions relate to governmental relations and also protect individuals in person and in property; consequently the student may inquire, is constitutional law a distinct branch of the law, and does the prefix "constitutional" indicate what subjects will be discussed? If not, constitutional law is not a significant title-head. We are also aware that the term, as the title of a body of law, is the outgrowth of our written constitution (14). Another takes the topic-head of "Judgments," and still another of "Estoppel," and a third "Jurisdiction," etc. Now the law of judgments includes one branch of the law of estoppel, and the law of estoppel concerns a portion of the law of judgments. Judgments and estoppel both must relate somewhat to jurisdiction or "due process of law," and due process of law is one of the fundamentals of constitutional law, which is almost equivalent to "the law of the land." Thus the mode of treatment is in no way controlled by that which is logical and which no discretion can change, viz., the natural relation and dependence of legal subjects.

Methods of Codes. It has been said that "no code from the Code Theodosian to the Code Civile of Canada has

[14] Professor Dicey, writing of Blackstone's Commentaries, says: "Of constitutional law, as such, there is not a word to be found in his Commentaries. *The matters which appear to belong to it are dealt with by him in the main under the head, 'Rights of Persons.'*" Dicey, Law of the Constitution, p. 7.

yet been tolerably well arranged. Not one shows any conception of the mutual relations of the great departments of law. Not one is governed by the logical principles of dichotomy (15), which, though it may not always be visible, yet should underlie and determine the main features of any system of classification" (16). It is not to be understood, however, that Prof. Holland would contend that Gaius Justinian's Institutes and the analyses of Hale and Blackstone are not controlled by the principles of classification. The failure of the New York Code is by Amos affirmed to be due largely to the uncertain use of terms. "The New York Civil Code may be described rather as a codification of text-books on the English Common Law rather than as a codification of the English Common Law itself. Apart from occasional scraps of terminology and arrangement borrowed from Justinian's Institutes and the Code Napoleon, the whole work reproduces in an utterly undigested form the notions and the

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15 Division of classes into sub-classes.

16 Holland, Forms of Law, 1870. "All that we now know of the law we know from written records. To make a code of the known law is therefore but to make a complete analytical and authoritative compiliation from these records. Draft of Civil Code, ch. xiv. "All advocates of codification recognize classification as the essential first step; e. g., the first great need then is a system of law expressed in clear, comprehensive language; this is a code. * * * Of course it is assumed that the code professes to rest on some basis of theoretical classification and is not as has been recommended in some quarters a mere orderly reproduction of the accidental distribution of topics at present in use among text-writers." Amos An Eng. Code, p. 193. "What is required and what must at some time or other be undertaken is a treble process, the process of elimination, the process of condensation, and the process of classification. This performance would make a code, call it by whatever name you please." David Dudley Field, Am. Bar Assn. 1889.

very phraseology in which the English Law is clothed in the most hastily compiled text-books. There is scarcely a symptom of a single ambiguous term having been submitted to the crucible of logical contention or of a complex notion having been reduced to its component elements'' (17).

§ 32a. **The utility of definition.** ''The use of words is to express ideas'' (18); but how shall ideas be accurately expressed unless apt words be chosen?

Lest the writer seem to assume the role of critic at the outset, he will, on the subject of the most prevalent fault of writers and speakers, in the careless use of leading terms, quote the language of another:

''Of all the fallacies to which the political writers are addicted, the most common, and at the same time most serious, is the fallacy of petitio principii (19), or of the illegitimate assumption of first principles. The most usual and formidable form of this fallacy is that of using question-begging terms, which consists either in including in the formal definition of a term some improved assumption, as being of the essence of the conception denoted, or—without including such assumption in the formal definition—by using the term as though such as-

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17 Amos An Eng. Code, p. 101.

18 Federalist, No. 37. "Men imagine," says Bacon, "that their reason governs words, whilst in fact words react on the understanding, and this has rendered philosophy and the sciences sophistical and inactive. Hence the great and solemn disputes of learned men, often terminating about words and names, in regard to which it would be better to proceed more advisedly in the first instance, and to bring such disputes to a regular issue by definition." Bacon's Works, vol. III. p. 349.

19 That is "begging the question."

sumption were implied. By this method the propositions from which our conclusions are to be deduced, instead of being proved, as they ought to be, are unconsciously imbibed by the mind with the definition, or with our conception of the term, and the conclusions thus in effect assumed'' (20).

In legal classification the several elements which make the body of law must first be separated in accordance with the principles of dichotomy—i. e., separation into genera and species. This is the first process of classification, and produces the great primary groups of law relating to subjects. Then follows the subdivisions displaying the elemental features of each subject. In the process of stating the positive and actual law relating to these subjects, other elements must be regarded, for example, principles and rules are different though frequently confounded. Principles are general doctrines, axioms, precepts and maxims, and as they have general operation upon many topics they may be repeated frequently as the reason for the rule or a guide to interpretation. Rules are always specific and positive, applying to (a) one subject only, (b) a specific part of the subject. In this respect Blackstone's method has never been surpassed; indeed, as it is but the application to law of the principles of logical discourse established by Aristotle, applied by Gaius and all later scientific jurists who follow the civilian methods, his method will not be surpassed until some one discovers that the inductive philosophy of Aristotle is based on fallacious principles.

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20 Smith's The State, 50, 51. See 1 Wilson's Works, pp. 50-51.

The subject may be demonstrated thus, taking Blackstone's Analysis as the illustration: He says he made it his first endeavor to mark out a plant of the laws of England, so comprehensive as that every title might be reduced to some or other of its general heads (21). In his Commentaries he fills up that analysis by stating a rule of law, and commenting upon its origin, growth and change, and giving illustrations of its application in decisions. In pursuing this plan he states under a particular head the rules applicable to a subject, without regard to whether the source of the rule was a statute of parliament, a custom of the country, a constitutional document like Magna Charta, or was simply evidenced by some legal decision (22) which was itself based upon reason and supposed policy (23).

§ 33. The principal heading for the outline. It is obviously necessary that some term be selected as the basis of the analysis, so comprehensive that every subordinate subject may be embraced within this general head. Here it is proper to remark that in the discussion of a legal subject, as well as any other, each word used should be selected with a natural appropriateness of the term used to convey the desired idea. We must also bear in mind that there is a mutation in language, as there is a development of thought; and language, as the vehicle of thought,

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21 Preface to Analysis, p. 4.

22 Black., p. 68; Analysis, ch. 2, sec. 3

23 Such, for example, as Coggs v. Bernard (1704), Lord Raymond, 909; s. c., 1 Sm. L. C. 369; s. c., Great Opinions by Great Judges, 40; s. c., Laws L. C. Simp. 194; s. c., Shir. L. C. 41—the great case in which Lord Holt elucidates the law of Bailments.

must, to keep pace with the progress of thought, either invent new words or ascribe a new meaning to the old ones.

§ 34. **New meaning of old words.** Throughout the nomenclature of the law will be found words which have come down to us from the Roman or Saxon period, or some intervening time, but the meaning which now attaches to a word may, and quite frequently does not, correspond to the meaning which was given to it originally (24). The body of the law which we are to analyze was framed by men of bold conceptions and upon new lines.

The matter is more plainly put and more directly applied to the subject in hand in the opinion to which we have before referred (25). "It is hardly possible to make any innovation in our philosophy concerning the mind and its operations without using new words and phrases, or giving a different meaning to those that are received. With equal propriety may this solid remark be applied to the great subject, on the principles of which the decision of this court is to be founded. The perverted use of genus and species in logic, and of impressions and ideas in metaphysics, has never done mischief so extensive or so practically pernicious as has been done by 'states' and 'sovereigns' in politics and jurisprudence (26); in the politics and jurisprudence even of those who wished and meant to be free. In the place of those ex-

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24 See Holland, Jur., 3, 4.

25 Chisholm v. Georgia, 2 Dall. *419.

26 Wilson, J., Chisholm v. Georgia, 2 Dall. *454.

pressions I intend not to substitute new ones; but the expressions themselves I shall certainly use for purposes different from those for which they have hitherto been frequently used'' (27).

§ 35. The beginning of legal analysis. Gaius. Gaius was a lecturer and writer upon law living about one hundred fifty years before Justinian. ''As the opinions of Gaius are not quoted by the subsequent jurists whose fragments are preserved in the Digest, it has been inferred that Gaius was a public teacher of jurisprudence (jus publice docens), who never in his lifetime obtained the highest distinction of the legal profession, the title of juris auctor (jus publice respondens). Valentinian, however, after his death raised Gaius to the position of juris auctor, that is, gave to his writings pre-eminent auctoritas, or exclusive legislative authority, equal to that of four other jurists, Papinian, Ulpian, Paulus, and Modestinus'' (28).

The renown of Gaius rests mainly upon his announcing the principles upon which all legal analysis has subsequently proceeded. He recognizes as sources of law the law of nature and the law of nations and the jus civile of the Romans (29). He agreed with the other Roman jurists of the second century in the assumption, ''on the authority of Greek philosophy, that there was a lex naturae binding upon them because it was a lex,'' and they endeavored to work up the dictates of this law

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27 See Tennessee v. Davis, 100 U. S. 263, 1 Ham. Blk. 137-141.

28 Poste's The Elements of Roman Law—Gaius, vi.

29 Sardars' Justinian, Int. 25.

and the jus gentium, together with the provisions of the old jus civile, into a whole (30). He was the first to see that whatever the source of the law might be, the whole body of the law was subject to an arrangement upon another principle, viz., the object operated upon by the rule: that to which the law "relates" was the touchstone of his analysis (31). This was showing that this body of rules as a whole was capable of a separation into classes of differing genera between which there was, however, a natural relation, and an interdependence. It was a great step in the progress of law as a science. This is the splendid period in the development of scientific jurisprudence. Says Mackeldy: "The scientific treatment of the law at this period (32) attained its highest excellence" (33). Again he says: "Jurisprudence, which had attained its meridian under Hadrian, the Antonines and their immediate successors, soon ceased to progress or to have life after the internal destruction of the empire subsequent to the death of Alexander Severus. All the science decayed, and the old Roman spirit expired beneath the oppression of despotism and the corruptions of morals" (34).

It may be truly said that the science of government never under the Romans attained to the Greek model. There is still one more period in the development of the

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30 Id.

31 See Poste's Gaius, 39.

32 Of Cicero, Hadrian, and the Antonines. Mackeldy, Roman Law, Int., § 40, p. 60; Poste's Gaius Pref. vi.

33 Mackeldy, Roman Law, Int., sec. 51.

34 Mackeldy, Roman Law, Int. sec. 60.

science of law or jurisprudence under the Romans, viz., the age of Justinian.

§ 36. **Justinian and the institutes.** Justinian's merit is not in the destruction of the old and invention of new principles. In the Code and the Digest his agents or commissioners compiled and collected, not all of the applications of the principles of the preceding ages, but, as they supposed, all the living principles of the Roman law.

The evolution of Justinian's Corpus Juris is thus stated by Poste: "In the course of centuries the accumulation of juristic writings of coordinate authority was a serious embarrassment to the tribunals. To remedy this evil, A. D. 426, Theodosius and Valentinian enacted what is called the law of citations (Cod. Theodosianus, 3), limiting legal authority to the opinions of five jurists, Gaius, Papinian, Ulpian, Paulus, Modestinus, and of any other jurists whom these writers quoted, provided that such quotations should be verified by reference to the original writings of those juris auctores. In case of a divergence of opinion, the authorities were to be counted, and the majority was to prevail. In case of an equal division of authorities, the voice of Papinian was to prevail. A. D. 533, Justinian published his Digest or Pandects, a compilation of extracts from the writings of the jurists, to which he gives legislative authority. Every sentence, accordingly, of these passages is called a lex, and the remainder of their writings is pronounced to be absolutely void of authority" (35).

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35 Poste's The Elements of Roman Law, Gaius, p. 38.

A similar course has been found necessary in every system of law, and the prediction may be ventured that our law must soon be restated in more scientific form and order.

The compilation of the Code and Pandects was, however, not his chief contribution to the science of law, for in these there is little regard to system and arrangement. An institutional work was needed in order to facilitate the study of the law. He therefore caused Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institutes, which should contain the rudiments of jurisprudence (36). This work was professedly founded on the Institutes of Gaius, so that Justinian's Institutes are in fact no more than a new edition of that work, which up to that time had been used as a first book for the study of Roman law, much of which, however, was obsolete at Justinian's time. In this new edition of Gaius' Institutes the wholly obsolete matter was omitted (37).

§ 37. **The principle of legal analysis.** It is necessary at the outset to discover the principle lying at the basis of all legal analysis. That principle, so far as it has been applied to any feasible attempt at classification or arrangement, is that the rules of law are to be classified according to the subject-matter of the rule of law, or as

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[36] See Sandars' Justinian, pp. 63-65.

[37] Mackeldy, Roman Law, Int., 60; Sandars' Justinian, Int., sec. 34, p. 2.

we may otherwise put the same idea, laws are to be arranged according to the objects to which they relate (38).

Classification of the Roman Law. Gaius, one of the celebrated Roman jurists, said: That all laws relate to persons (39), to things, or to actions. No great use was made of these principles in the Roman code or pandects, and it is apparent to any one who gives that body of laws close examination that those books have not been arranged in conformity with these principles (40). While the divisions pointed out by Gaius are observed, the external arrangement of the law of Rome was never made to conform to this internal arrangement (41).

§ 38. Method of the institutes. The greatest application of the principles and the nearest approach to system is found in the arrangement of the Institutes (42), which was a work designed for the use of students, and meant to give an outline or introduction to the laws of Rome as found in the Code and the Digest. Judge Tucker truly remarked that in arbitrary governments questions concerning the constitution rarely occur, and are still more rarely discussed, and hence in such governments the study of the law merely as a profession does not seem necessarily to require the study of the constitution; the former

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38 Bowyer, Com. on Civil Law, ch. 8; Mackeldy's Roman Law, p. 117, sec. 124; Austin's Jurisprudence, 761. See Story's Conflict of Law, § 13.

39 Persona, i. e., condition or status.

40 1 Stephen's Com., p. xi.; Thibaut's System Lindley's Trans. *5. *See Hastie's Outlines Jur. 238.

41 Sandars' Justinian, Introduction, p. 24; Thibaut's System, Lindley's Trans. *5.

42 The Institutes of Gaius are referred to as such; those of Justinian are universally cited as the Institutes.

being limited to such controversies between individuals as do not involve in them any question of the authority of the government itself, and the latter being supposed to be a theme too exalted for the comprehension of the private individual, and as such discouraged and neglected (43). This is undoubtedly the reason why the arrangement and discussion of the Institutes does not embrace the relation of magistrate and people.

The following taken from Spence's "Equitable Jurisdiction," shows sufficiently the arrangement of the Institutes: "The laws of the Romans may be classed under five general divisions: First. Those which concern the distinctions of persons and the relations which existed between individuals. Second. Those which related to property or things. Third. Those which related to the rights of individuals in respect to their transactions with others, and to the claims arising from the conduct of individuals one to another, or the laws relating to obligations. Fourth. Those which related to the enforcing by legal means the rights and claims of individuals, or the laws which concerned the machinery of actions. Fifth. The laws relating to public offenses."

§ 39. **Blackstone's disposition of these subjects.** A comparison of this analysis of Roman law with Blackstone's analysis of English law shows that Blackstone has reproduced, in his Commentaries, all excepting the third division. The first division, under "Rights of Persons" (book 1); the second division, under "Rights of Things" (book 2); the fourth division, "Of Actions and

43 Preface to Tucker's Black., xvi.

Defenses of Actions'' (book 3), under the head of ''Private Wrongs,'' and the fifth division, in book 4, under the title ''Of Public Wrongs.'' What, then, becomes of the third head, namely, ''Obligations?''

Obligations were those which related to the rights of individuals in regard to their transactions with each other, and the claims arising from the conduct of individuals one to another.

In the Roman law these obligations arose by reason of, first, contracts, express or implied, which Spence has designated by the words ''transactions with others;'' or second, from torts or wrongs, as understood in English or American jurisprudence, expressed by Spence as arising from conduct of individuals one to another, which the Roman called delicts.

All that part of obligations arising from contracts is logically treated by Blackstone under ''The Rights of Things,'' as all such contracts affected property, and conduct imposing an obligation was some wrongful act of one person against another, amounting to a tort.

§ 40. **Universality of the principle of analysis.** These principles of Gaius, and their application in the Institutes, lie at the basis of every systematic analysis of modern law, and it is obvious that, if the principles are sound, they are applicable alike to all systems (44).

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44 Perhaps this should not be passed by without proof or illustration. Is it not a fact now *obvious* that in all societies there is an understructure of arrangement which is identical—that is, a body of rules relating to the exercise of magistracy, another of family law, another of property rights, another of remedies, and a body of criminal law? However the details may differ the classification is always there.

Blackstone says, in the introduction to his analysis of the laws of England: "The most early and, indeed, most useful of those who have labored in reducing our laws are Glanville, Britton, Bracton and Fleta." (Bracton's system was to book 3, tract 1, substantive and fundamental rules; the balance, legal procedure, was professedly following the Roman law.) Fitzherbert and Brooks, and the subsequent authors of abridgments, have chosen a method the least adapted of any to convey the rudiments of a science; namely, that of the alphabet. Dr. Cowl follows the Institutes of Justinian. He then says: "Of all the schemes hitherto made public for digesting the laws of England, the most natural and scientific of any, as well as the most comprehensive appeared to be that of Sir Matthew Hale in his posthumous analysis of the law."

Critical Examination of the Principle. It is important to ascertain clearly the principles lying at the basis of each analysis, and also to see how far they are applicable to our law.

We have asserted that the principle lying at the basis of the various analyses is that the laws are to be classified according to the objects of the rules. Austin, speaking of Gaius, says: "That he divided jus, or law, into jus gentium and jus civile, and, having shown the various sources of the assumption of law, or jus, proceeds to divide that same subject according to the objects or subjects with which it is conversant" (45).

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45 Austin's Jur., p. 761.

Blackstone says in the opening words of his Commentaries (46): "The objects of the laws of England are so very numerous and extensive that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically under proper and distinct heads." In his fourth paragraph he says: "The objects of the laws of England falling into this four-fold divison, the present Commentaries will, therefore, consist of the four following parts." What the law concerns, determines its place in Hale's Analysis.

The Rules for Logical Classification (47). The rules for the logical division of subjects, according to Archbishop Whately (48), are:

"1. Each of the parts, or any of them short of all, must contain less, i. e., have a narrower signification, than the thing divided.

"2. All the parts together must be exactly equal to the thing divided; therefore we must be careful to ascertain that the summum genus may be predicated of every term placed under it, and of nothing else.

"3. The parts or members must be opposed, i. e., must not be contained in one another, e. g., if you were to divide the word 'book' into poetical, historical, folio, quarto, French, Latin, etc., the members would be contained in each other; for a French book may be a quarto or octavo, and a quarto, French or English, etc. 'Therefore,' continues the Archbishop, 'you must be careful to

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46 1 Blk. Com. *121.

47 These are useful in definition.

48 Logic, p. 93.

keep in mind the principle of division with which you set out, e. g., whether you begin dividing books according to their matter, their language, or their size, all these being so many cross divisions. And when anything is capable, as in the above instance, of being divided in several different ways, we are not to reckon one of these as the true, or real, or right one, without specifying what the object is which we have in view; for one mode of dividing may be the most suitable for one purpose, as, e. g., one of the above modes of dividing books would be the most suitable to a bookbinder, another in a philosophical, and the other in a philological view. . . . When you have occasion to divide anything in several different ways —that is on several principles of division—you should take care to state distinctly how many principles of division you are making, and on what principle each proceeds' " (49).

§ 41. **The universal system of classification.** The great aim of the logical sciences is the arrangement of all knowl-

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[49] Sketch of a Scientific Classification of Rights, Journal of Juris., Edinburgh, 1864. Quoted in XXV Am. Bar Asso. Rep. p. 457.

A good illustration is furnished by the following, from a lecture delivered by Mr. Justice Brewer to the students of Haverford College. He says: "We classify nations in various ways, as for instance, by their form of government. One is a kingdom, another an empire, and still another a republic. Also by race. Great Britain is an Anglo Saxon nation, France a Gallic, Germany a Teutonic, Russia a Slav. And still again by religion. One is a Mohammedan nation, others are Heathen, and still others are Christian nations."

Here the learned Justice mentions three cross divisions. Another cross division of the race is the one used for the purpose of showing the ethnic affinity of races, as the Arian, Semitic, etc. When the subject of real property is reached there we shall have several viewpoints of estates.

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edge in order to facilitate its understanding, and thereby cause it to actually guide and control the actions of men. If historical comparative and inductive jurisprudence have any practical vocation, it consists in the discovery and publication of a system of classification capable of accommodating all the elements which make up the law of a given state into one orderly, comprehensive and simple whole. Whoever will carefully consider the various institutions and laws of the several civilized nations of the world will perceive that there are certain fundamental institutions common to them all, and however these may vary in their details, they have during every period of their development disclosed this same similarity in elemental features. The elucidation of this idea has been said to be the most characteristic and permanently valuable feature of Mr. Austin's labors.

Professor Sheldon Amos says: "There are few students of English Law who are unaware that the most finished and characteristic portion of the Works of the late Mr. Austin is occupied with ascertaining the limits of the Province of Jurisprudence. It is not easy to exaggerate the importance of the task itself, and it would be superfluous to dwell upon the acuteness and laboriousness with which it was carried out—however imperfect as a vehicle of the author's total thoughts was the practical shape which his speculations chanced to take. Mr. Austin established once for all, as has been already intimated, with a decisive clearness which none of his rivals in this or in any other country have equalled, that in all Systems of Law—to whatever period or form of Civilization they

may belong—there are certain definite and lasting Conceptions the constant reappearance of which can ever assuredly be counted upon, and which are capable of being expressed in the terms of an universal Language. Starting from these permanent Conceptions, he pointed out that a basis of Classification might be discovered to which the vagaries of the most abnormal and idiosyncratic Legal System could not but adapt themselves'' (50).

Professor Amos does not intend to be understood, that this is a discovery of Professor Austin's—only that he had made the fact more clear than others who had preceded him. Indeed, Sir William Jones, one of England's greatest scholars, who had given much time to the consideration of foreign systems of law, speaks of the remarkable similarity in fundamental matters among all nations. Thus he says of the law:

''The student of the law will constantly observe a striking uniformity among all nations, whatever seas or mountains may separate them, or how many ages soever may have elapsed between the periods of their existence, in those great and fundamental principles, which, being clearly deduced from natural reason, are equally diffused over all mankind, and are not subject to alteration by any change of place or time; nor will he fail to mark as striking a diversity in those laws, which, proceeding

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50 Amos' "An English Code," p. 205. It should always be borne in mind that Professor Austin is to be judged by a half completed work. He died in that period when men engaged in such a task as his are only reaching the full power of maturity. Had he lived to have examined the English system of law in minute detail, and sufficiently to apply to it his classification, we would then be in position to judge of the practical nature of his theories.

merely from positive institution, are, consequently, as various as the wills and fancies of those who enact them" (51).

Professor Amos, after speaking of the family as the natural atomic element of society thus presents the institutional elements of a fully developed society (52).

According to these views the State is actually, and has been historically, evolved out of single Families, through the medium of associated Families; and its proper energy consists in the incessant action and reaction of the domestic life and responsibilities of every citizen on his public life and responsibilities, and of his public on his domestic. Thus every man is called and bound to be selfish, and every man is called and bound to be self-sacrificing; and it is the hardest duty of the Statesman

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51 Sir William Jones' "Speeches of Isaeus," quoted from Dillon's "Laws and Jurisprudence," p. 137.

52 We are not giving approval to the position that the family is *now* the *atomic element* of Society, but it is yet the primary *institution.* On the subject of the change which has culminated in the Anglo-Saxon idea of individual liberty, Professor Maine says:

"The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. The advance has been accomplished at varying rates of celerity, and there are societies not absolutely stationary in which the collapse of the ancient organization can only be perceived by careful study of the phenomena they present. But whatever its pace, the change has not been subject to reaction or recoil, and apparent retardation will be found to have been occasioned through the absorption of archaic ideas and customs from some entirely foreign source. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract."

Maine's Ancient Law, pp. 168-169.

and of the Moralist, as well as of every citizen within the sanctuary of his own spirit, to fix the limits of such competing responsibilities.

Thus that Family life (including the topics of Marriage and Succession) and Government (including the topics of Crime and Procedure) will form a bulky portion of even the most embryonic legal system, would be anticipated—even were there no evidence on the matter accessible, derived from legal systems of every shade of development, and testifying uniformly to the precision and laboriousness with which these departments are invariably worked out. Other leading portions of every legal system correspond to like universally distributed groups of facts. The competition for the use of the material objects forming portions of the visible universe originates Laws of Ownership. Industry, Commerce, and indeed the most elementary Division of Labour and habits of Cooperation, originate Laws of Contract. The historical relations of these two phases of Laws, in primitive societies at the least, may be learned from Professor Maine. For the present purpose it is sufficient to notice that Laws of Ownership and Laws of Contract—however much they may be inextricably intertwined through logical confusions and historical accident—form two distinct and permanent departments of every legal system; and, when placed side by side with Family-law, with Laws regulating the Constitution and Administration of the State, and with Criminal Law, afford a series of immutable elements into which every existing or possible legal system admits of being readily decomposed.

On testing the value of these anticipations by referring to the most prevalent legal systems in modern and ancient times, and in the Western and Eastern Worlds—however much the inquiry may be perplexed by the intrusion of what may be called the non-natural elements supplied in certain communities by superstition and priestcraft, the essential uniformity of all legal systems is substantiated beyond dispute. This uniformity, be it noted, is not one of positive and detailed regulations, but of intellectual conceptions, of moral assumptions, and of practical adaptation to certain marked and leading characteristics of all national existence'' (53).

§ 42. **Explanation and application of this theory.** Slight reflection on the part of the modern reader, whether he be artisan, tradesman, manufacturer, farmer or professional man, will be sufficient to enable the comprehension that in a broad sense all systems of law are structurally alike, and that while all have grown and developed differently, all have been obliged to observe a certain natural, logical framework, simply because it is the order of nature, and therefore allows no arbitrary choice. This natural, logical organization of the laws of every country, is as follows:

The rules governing governmental relations. In every system of law there is a body of rules intended to organize the government, mark out the departments of service, designate the orbit and limitations of its power, provide the manner of choosing magistrates and limiting their power and prescribing the manner of its exercise.

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53 Amos' "An English Code," pp. 214, 215, 216.

Family Law exists in every form of government and it passes in English countries under the name of "Domestic Relations." In every country, be its inhabitants Caucasian or Mongolian, black or white, there is the Family, everywhere there is marriage, everywhere there is power of parents over children, there is some form of guardianship—there are domestic servants, etc.

Property Law. The foundation of civilized prosperity is property. Its acquisition comes about by trade, commerce, service or labor. It takes on a variety of forms —the material earth, land and waters, the things which grow on or in it, or are taken from it, or attached to it, or issue out of it, or are convenient adjuncts of land, as easements of light, air, ways, etc. The movable things which are constructed out of these material things, or which exist in nature, form another class of property called chattels. The refinements of law and civilization have attached the quality of property to things intangible. The obligations which one may give, common forms of which are bonds and notes, and certain obligations which arise from transactions or conduct, are treated also as property, and are embraced within another great group, choses. The first of these passes under the name real property; the others are species of the class called personal property.

Public protection and judicial remedies. A system of Police and Administrative and Judicial tribunals are necessarily established in order to render practically perfect the rights which are embraced within the classification pointed out above, namely, political rights, property

rights and domestic rights, and so all governments have established another body of rules creating courts and governing the administration of law. It is sometimes called the law of actions, sometimes Procedure.

Public offences and crimes. The experience of the world demonstrates that evilly disposed men will violate the most sacred rights. The forms and methods by which these rights are violated are so similar in different ages, and among different people, that the law-makers are able to predict with reasonable certainty that there will be homicide, thefts, embezzlements and arson. In fact, all the various offences are constantly recurring, and hence, every nation has found it necessary to establish a code of law for the punishment of offenders, and it is called the law of crimes, or "Criminal Law."

Of course these branches of law did not develop evenly, naturally the every day affairs of life were first reduced to some sort of order.

A very thoughtful writer says concerning the development of the law: "At first only rights arising between subjects are determined and protected by the law, whilst the Sovereign remains above the law. Under barbaric despotism the Sovereign acknowledges no legal rule binding upon him in his conduct towards his subjects. But in time the relations between the Government and the people become subjected to certain positive laws. And the body of laws determining the relations between individuals and their government, is generally termed Constitutional Law or Political Law; the latter term is pref-

erable" (54). Again he says, "The Political Law of a nation is the whole of the legal relations existing between the governors and governed" (55).

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[54] Heron on Jurisprudence, p. 70.
[55] Id. p. 75.

CHAPTER IV.

PRIMARY CLASSIFICATION OF SUBJECTS.

§ 43. **Nature and uses of classification.** The questions are sometimes asked—What is the use of studying classification? And what do we care how Gaius or Hale or Blackstone classified the law? The practical results to be derived from even such a brief review as is here presented are:

First, a familiarity with legal processes of thought, and the reason why the law is as it is.

Second, a clearer conception of the meaning of the words which must be often used throughout the book.

Third, the acquisition of a well arranged mental storehouse wherein all the knowledge acquired naturally and easily takes its place. Thus the mere learning is made more easy and the matter of retaining becomes not mere memory, but to a degree reason—because the student knowing the reason can much more easily retain or reproduce the idea in his own words.

In the process of separating the corpus juris of the United States into different subjects, each of which may in turn be examined minutely, we necessarily avail ourselves of what is called legal analysis.

Legal analysis explained. Analysis, applied to law and used in reference to a tangible result attained, has

a meaning peculiar to itself; e. g., when we speak of Hale's analysis or Blackstone's analysis, the phrase calls to mind the synoptical outline of English law, rather than the processes by which these results have been attained.

Analysis, used abstractly or applied to chemistry, naturally suggests the process of separation, or the resolution of some substance into its elements.

Legal analysis, however, involves two processes. First. Analysis in its narrower sense, i. e., the resolution of the body of the law into its separate parts according to the principles of dichotomy (1), i. e., separation according to species and genera.

The second process may be termed synthetical, and consists in arranging the matter thus differentiated by the first process in such a manner that each sub-head will be again divided, and so on until all the subjects and the mutual relation and dependence of each appears upon the surface (2).

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1 See any dictionary, titles, Method, Analysis, Synthesis, Synopsis. This is the plan of Lord Comyn's celebrated Digest of English Law, which is to-day unexcelled by any subsequent work. The editor of Comyn's Digest says: "The general plan of this Digest is that the author lays down principles or positions of law, and illustrates them by instances, which he supports by authorities; and these are branched out and divided into consequential positions, or points of doctrine, illustrated and supported in the same manner. By this means, each head or title exhibits a progressive argument upon the subject, and one paragraph (and in like manner one division or subdivision, etc.) follows another in natural and successive order, till the subject is exhausted."

2 This work must be done either mentally or visibly by an actual outline. Before any subject can be thoroughly mastered the mind must see the outline. Henry St. George Tucker, in his Commentaries, says: "It is with the law as with everything else that is to be learned. It is sooner learned, and better learned, by being studied systematically.

§ 44. **Classification of legal treatises.** The result of such a process is the production of a synoptical outline, and in the production of legal treatises the extent to which comment, explanation and illustration is indulged in by the writer is the test to determine whether the book is an analysis, an institute, or a commentary. As an example of books of the character above mentioned, of the first class are the outlines of Hale and Blackstone, in which the writers indulge in no comment at all, or but occasionally a mere reference; as, for example, Lord Hale speaks of the classes of Men, sub-class Aliens, and adds: "Here comes in the learning of (concerning) aliens, as naturalization, denization, etc." (3) As examples of institutes we have Gaius, Justinian, Wood's Institutes of English Law, Minor's Institutes, and that of Bouvier, unless it be said that the last two indulge in more comment than is allowable in a mere institute, and thereby become commentaries.

The best known examples of commentaries are Blackstone's and Kent's Commentaries, and the writings of Judge Story. Every extended treatise which now passes

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The rudis indigestaque moles must be reduced to order by the student himself, or by somebody for him. That every person who comes to acquire a knowledge of this complicated subject should have to arrange for himself would exhibit a state of infancy in the science unworthy of our times. It would be as if the innumerable papers in a clerk's office were thrown in a common heap without order, and each suitor was compelled to hunt in the confused mass for whatever he might want, to arrange them for his own use, and then throw them back again into the same undistinguished chaos, to try the ingenuity and patience of the next adventurer. These evils were early discovered, without doubt, but they have been only recently remedied to any considerable extent." See Minor's Institutes, Preface.

[3] Hale's Analysis, p. 3.

under the title of "text-books" is in reality a commentary on the particular subject, unless its order is so deficient as to make it partake more of the character of a digest.

"Institutes," says Lord Bacon (4), "ought to have two properties—the one a perspicuous and clear order of method, and the other a universal latitude or comprehension, that the students may have a little pre-notion of everything, like a model towards a great building."

A commentary must of necessity be as orderly in its treatment as either an analysis or an institute, and should the title a commentary on English law or American law be taken, then every subject should be noticed. The order should not be changed because of the bulk of the work. For example, Kent's Commentaries are said by Professor Dwight to be incomplete as commentaries on American law because they do not include within the treatment the subject of torts, criminal law and procedure (5).

§ 45. **Legal analysis in American treatises.** Authors, especially in recent years, have not been noted for their lucidity of arrangement, although the legal profession has exhibited a high degree and skill in the first branch of

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[4] Works, vol. II, p. 232.

[5] 1 Green Bag, 143. Professor Dwight did not mean that the treatment was imperfect, but that the scope was narrower than the title. To the author, the arrangement of Kent's Commentaries is its principal defect. The classification of the matter contained in Part one, by itself, under the title, "The Constitutional Jurisprudence of the United States," leads one to view the subject as a body of law isolated from the matter of the next part, which is "Municipal Law;" whereas, the whole of the book, as well as Part One, is within the title "Municipal Law." The arrangement of the book has generally been regarded as less scientific than that of Blackstone. See Am. Law Review, vol. 1, p. 182. [1866].

legal analysis. This is undoubtedly the natural result of regarding constitutional law, which is properly a part of the law of persons, as a distinct field of law. Kent's Commentaries is a striking illustration of this influence (6).

How legal subjects are classified. It is obvious that the arrangement and classification of a system of law depends upon the nature and peculiarities of the system of law under treatment, and that it is illogical to undertake to arrange one system of law in accordance with the synopsis designed to present another system, unless the two systems are entirely similar in structure, and the synopsis which presents itself is strictly correct in all its parts, and especially in its leading divisions. Most authors who have attempted to treat the whole body of American law have undertaken to cast it in the mould of the outline of English law found in Blackstone's Commentaries, without taking the pains to investigate the soundness of the reasons for his method, and without questioning whether the two systems were identical in outline. Not one American writer has stated the principle of arrangement which dominated his classification; not

[6] The difficulty is to look through the formal mode of expression and artificial legislative classification and formulate a system in compliance with the logical order of the subjects. The law of England used to be classed as common law or lex non scripta, and statute or *written* law, and this outward form was a hindrance to its treatment. Lord Hale perceived that the source of the law had nothing to do with the method of arrangement, as he says in the preface to the analysis: "And although the laws of England are generally distributed into the common law and statute law, I shall not distribute my analysis according to this method, but shall take in and include them both together as constituting one common bulk or matter of the laws of England." He applied the true touchstone.

one has arranged his material in accordance with the logical principles which were used by Hale, and which Blackstone professed to follow in his Commentaries.

§ 46. The reason for and fallacy of Blackstone's primary classification. In seeking for the most appropriate classification, we must of necessity examine those methods which have been heretofore used, and ascertain, if we can, the reasons which underlie them, test the accuracy of their application, and determine their applicability to our system of laws. The importance of a logical and correct basis of primary classification cannot be overestimated (7).

Blackstone's primary division of the law of England is into Rights and Wrongs. Municipal law he defines to be a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong (8).

In book 1, on page 122, he says: "Now, as (i. e., because) municipal law is a rule of civil conduct commanding what is right and prohibiting what is wrong, it follows that the principal and primary objects of law are rights and wrongs." He then indicates that "rights" are divided into rights of persons and rights of things, and

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[7] By some philosophers, definition and division are considered as the two great nerves of science. But unless they are marked by the purest precision, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding—they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of the first principle, will spread confusion, distraction, and contradictions over the remotest parts of the most extended system." 1 Wilson's Works, 52.

[8] 1 Blk. Com. 44.

"wrongs" into private wrongs and public wrongs, and then continues: "The objects of the law of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts, viz.," etc.

In book 3, page 1, after reciting his definition, he says: "From hence, therefore, it follows that the primary objects of law are the establishment of rights and the prohibition of wrongs, and this occasioned the distribution of these collections into two general heads."

By this recital two things are made perfectly obvious. First, that the principle of analysis recognized by Blackstone is that rules are to be classified according to the objects to which the rules relate; second, that he determined what these objects were by what he supposed to be a definition of municipal law.

The principal object of this examination is to show the following things:

First, That the division Rights and Wrongs is not a logical, scientific or practical division under which to treat the law.

Second, That the definition which is the basis of the classification is erroneous.

Third, That there is no necessary logical connection between the definition and the classification.

Fourth, That Blackstone did not in fact conform his treatment of the law to this division.

Fifth, That there is another and the true primary classification to which he did in the main conform, and which is the one adopted in this book.

The great importance of this is to prevent confusion or uncertainty in the very fundamentals, for as before remarked, confusion or lack of understanding here makes it impossible that clearness and complete comprehension can be had anywhere. Whereas if these few pages are acquired the rest will present an easy and in fact a pleasant task, because the student is equipped for the work.

It is just as easy for the strong man to do difficult things as it is for the weak man to do much easier ones. Equipment is the secret of all efficiency; equipment is capacity.

Blackstone's definition of municipal law examined. Blackstone's definition of municipal law has received criticism of great weight on each of its essential points (9), viz.: First. It is denied that it is a rule prescribed (10), as distinguished from consented to, or agreed upon. Second. It is denied that it is prescribed by the supreme power in a state (11). Third. It is denied that it necessarily commands what is right and prohibits what is wrong.

The definition lying as it does at the threshold, and constituting in fact the basis, of his primary division of the body of law into two general heads just mentioned, the question as to whether the definition is correct, and the

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[9] 1 Cooley's Blackstone (2d and 3d eds.), 44, note; 1 Sharswood's Blackstone, 44, note, 122, note; Heron on Jurisprudence, 65; Hoffman's Legal Outline, 268; 1 Bouvier's Institute, p. 6; Walker's American Law, p. 47; Austin's Jurisprudence, vol. 1, p. 220.

[10] Cooley, Blk. (4th ed.), *45, note; Dartmouth College Case, 4 Wheat. 518; Binghampton Bridge, 3 Wall. 57; 1 Wilson's Works, 75, 159 et seq.

[11] 1 Wilson's Works, 55, 65; 1 Hammond's Blk. 112.

division follows, is of vital importance. But at this point of our inquiry we are only interested in that last clause of the definition, viz., whether a law is a rule "commanding what is right and prohibiting what is wrong," and whether, as a consequence thereof, the body of the law must be divided into the two general heads, Rights and Wrongs. The other branch, locating the supreme authority in the legislative branch, will be discussed when we explain the relation of Magistrate and People.

The point of criticism applied to this branch of the definition is, that it is superfluous and conveys an erroneous idea of municipal law. Many of the criticisms will be found in notes to pages 44 and 122 of volume 1 of different editions of the Commentaries, cited above (12). Blackstone's handling of the question is in nowise clear. He seems to connect the moral obligation of natural law with the law of nations (13), binding upon nations, and being their only bond, for the reason that there is no superior.

In accordance with his idea that, to have a law binding, there must be a superior in the law of nations, he finds a superior to nations in the Deity, or the law of God; but he immediately contrasts with this, municipal

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[12] I know of but two modern writers who approve of this definition. The first is Prof. Bliss, in his work on Sovereignty, and the other is Prof. Hammond, in the notes to his edition of Blackstone: but the opinion of Mr. Bliss is based upon the proposition that an act of the legislature which is contrary to natural right is invalid, he quoting from Blackstone's Commentaries, pp. 39, 44. In this position Mr. Bliss is not supported by any one, and the authorities he cites go to another proposition; neither does he address himself to the question as being one of classification.

[13] 1 Blk. Com. 43.

law or the rule of civil conduct (14); for he says: "Municipal law is a rule of civil conduct. This distinguishes municipal law from the natural or revealed. The former (natural) is a rule of moral conduct, and the latter (revealed) a rule of faith; . . . but municipal or civil law regards him (man) as a citizen and bound to other duties than those of mere nature or religion" (15). Then follows an inquiry into the nature of civil government, the object of which is to locate a supreme power, which, to be consistent with his definition, must be found somewhere. "There is," he says, "and must be in all of them (states), a supreme, irresistible, absolute and uncontrollable authority in which the jura summi imperii or right of sovereignty resides" (16). This he finds to be in England the legislative body, which is the parliament (17). In the United States the idea is entirely different, and will be discussed with Magistrate and People.

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14 Book I, p. 44.

15 Id., p. 45.

16 Id., p. 49. Bentham says: "The vehemence of this passage is remarkable. He ransacks the language; he piles up, one upon another, four of the most tremendous epithets he can find; he heaps Ossa upon Pelion; and, as if the English tongue did not furnish expressions strong or imposing enough, he tops the whole with a piece of formidable Latinity. From all this agitation it is plain, I think, there is something which he has very much at heart; which he wishes, but fears, perhaps, to bring out undisguised; which in several places, notwithstanding, bursts out involuntarily, as it were, before he is well ready for it; and which, a certain discretion, getting at last the upper hand of propensity, forces as we have seen, to dribble away in a string of obscure sophisms. Thus, oddly enough, it happens that that passage of them all which, if I mistake not, is the only one that was meant to be dedicated expressly to the subject, is the least explicit on it." Fragment on Gov., ch. 4, sec. 13.

17 Page 49.

§ 47. **The right-and-wrong clause condemned.** After establishing and locating in this manner the supreme authority, he proceeds to the latter clause of the definition, commanding what is right and prohibiting what is wrong (18), and proceeds: "Now, in order to do this completely, it is, first of all, necessary that the boundaries of right and wrong be established and ascertained by law." What law does he mean? Obviously the municipal or civil law, of which he is speaking, for he proceeds: It remains to consider in what manner the law is said to ascertain the boundaries of right and wrong. For this purpose laws are said to consist of two parts, declaratory and directory (19). "The first," he says, "depends not so much upon the law of revelation or of nature as upon the will of the legislator." But he at once modifies the view by the statement that the "legislature must not violate rights established by natural law." "The directory part of the law," he says, "stands upon the same footing, being implied from the declaratory" (20). The question, then, whether this clause of the definition is surplusage or conveys an erroneous idea of a law, resolves itself into this: whether or not legislative acts must conform to the moral or natural standard of right and wrong as taught by the law of nature or religion? For Blackstone says: "No human laws are of any validity if contrary to this (law of nature), and such of them as are valid derive all their force, mediately or immediately, from this origin." The United States supreme

18 Page 51.
19 Page 53.
20 Book I, p. 55.

court has declared this idea impracticable as a rule of action to be administered in courts (21).

Judge Cooley, in his notes to this proposition in the Commentaries, with his usual directness and practical good sense, the result of lifelong contact with practical jurisprudence, says: "Under no circumstances do mankind differ more widely than when they undertake to apply their fallible judgment to the determination of what the law of God commands or of what it forbids. . . . Now, when it is said that no human laws which are opposed to the law of God can be of any validity, we may accept the declaration as theoretically true, but in government it is fallacy" (22).

Christian says that the "latter branch, commanding what is right and prohibiting what is wrong, must be either superfluous or convey a defective idea of municipal law; for if right and wrong refer to the municipal law, then whatever it commands is right and whatever it prohibits is wrong, and the clause would be insignificant tautology; but if right and wrong be referred to the law of nature, then the definition will become deficient or erroneous" (23).

Judge Sharswood says: "But mere law (the command of a superior) cannot per se annex the moral qualities of right or wrong to the action, in itself considered, commanded or prohibited. Right and wrong are abstract moral qualities, resulting necessarily from the relations

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21 Allen v. Ferguson, 18 Wall. 1.

22 1 Cooley's Blk. (4th ed.) 50, note; Peel Splint Coal Co. v. West Virginia, 36 W. Va. 802; 17 L. R. A. 387.

23 1 Sharswood's Blk. 44, note.

of persons or things. No law can make that right which is itself wrong. The definition of Cicero certainly avoids this objectionable feature of Blackstone's language" (24).

In his notes to page 122 of book 1 of the Commentaries (3d edition), Judge Cooley has made a complete and exhaustive examination of the idea of natural rights, moral rights, and legal rights. In respect to natural rights, which Blackstone treats as having their origin in the natural state of society, he says: "By this it is implied that there is a state of nature antedating political organizations, and therefore antedating law, of which every individual has rights given him by the law of nature, which every other individual is under obligation to respect and observe. Now of this it must be said, first, that the conception of such a state of nature is mere fancy; that it never did and never can exist; for the individual is never found outside of society, or of the reach of human law, except, perhaps, in wholly exceptional and anomalous cases, and therefore the supposition of such a state must be useless, even as a matter of theory. It seems clear that any theory, in order to possess any possible value, must recognize whatever condition of things is universal and inevitable."

Judge Cooley quotes approvingly (25) from Mr. Bentham: "The great multitude of the people are continually talking of the law of nature, and then they go on giving you their sentiments as to what is right and what is wrong, and these sentiments you are to understand are

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24 1 Sharswood's Blk. 44, note.

25 1 Cooley's Blk. (3d ed.), p. 39, note.

so many chapters and sections of the law of nature. Instead of the law of nature, you have sometimes the law of reason, right reason, natural justice, natural equity, good order; and any of them will do equally as well."

The great trouble with the theory is that it is a mere theory, and is not based on any fact. It is defining what law is by the use of a philosophical theory of what it ought to be. There never was, and never could be, any natural society not governed by human laws (26). The fallacy seems more plain if the doctrine is traced to its source. The Institutes define jurisprudence as the knowledge of things divine and human, the science of the just and the unjust (27).

§ 48. **The definition no basis for classification.** Sandars, in his notes, says: "Jurisprudentia is the knowledge of what is jus; and jus, according to the theory of the law of nature, laid down what is commanded by right reason, this right reason being common to nature, or, as the Romans more often said, to the Gods and to man. On this ground, and also because public law has to deal with religious worship, the knowledge of divine things was therefore necessary, as well as the knowledge of human things, to say what were the elements of jus. Both this and the preceding definition, taken at random out of the writings of Ulpian, are unintelligible unless taken in connection with a philosophical theory from which they are here dissevered, and are quite out of place at the be-

[26] 2 Wilson's Works, p. 300; 1 Sharswood's Blk., p. 48, n. 11.
[27] Inst., 1-1.

ginnig of an elementary treatise on law'' (28). Blackstone did not regard this, and based his whole theory of law and classification upon this obsolete definition.

The Christian religion having been, until quite recently at least, held to be the basis of the law of England (29), and so rigidly so at the time of Blackstone that it was an indictable blasphemous libel to question, no matter how moderately, the divinity of Christ or the truth of the Christian religion, constitutes a justification for his position stronger than many now suppose who look at matters from the present standpoint. A recent decision in England has materially changed the light in which the matter is regarded, and England now enjoys the liberty of free religious discussion, providing the party questioning the truth of the prevailing Christian religion maintains a perfect control of his temper and couches his argument in dignified and well-chosen language (30). Americans can appreciate the fourth so-called absolute right.

The Institutes also defines the law of nature. The law of nature is that law which nature teaches to all animals; for this law does not apply exclusively to the human race, but applies to all animals, whether of the air, the earth or the water (31).

The trouble with this appendage (commanding what is right, etc.) and its basis is that by it you can prove

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28 Sandars' Justinian, lib. 1, tit. 1, and note. See also Id., Introduction, sec. 34.

29 1 Cooley's Blk., p. 59. See Cooley's Const. Lim., p. 572.

30 Reg. v. Ramsay & Foot, 48 L. T. (N. S.) 733, a case involving the Bradlaugh episode.

31 Inst., 1—2.

anything. It is the basis of the divine right of kings, sanctioned by Aristotle, Justinian, Bacon, Queen Elizabeth and King James, and as Prof. Hammond himself says, "Blackstone, in falling back on to the original-compact idea, without apparently perceiving the inconsistency between the doctrine and his definition, an inconsistency of which his first American critic, Wilson, has made effective use, showing that this definition ranked him, in spite of himself, with the supporters of divine right and absolute power" (32).

The Institutes lays down the doctrine that the law of nature was the basis of the law of nations, and yet holds that slavery was contrary to the law of nature, but was an incident of war, which, of course, was regulated by the law of nations and humanity. The Roman civil law recognized regulated slavery. The very churches of America have been divided upon the subject.

Blackstone says the only true and natural foundations

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[32] 1 Hammond's Blk. 112; Wilson's Works, vol. 1, pp. 54-75. Men of the same race, religion, ancestry, language and law could justify the institution of slavery, and with the same law illustrate that the air of England could not be breathed by a slave. Best, Judge, in the celebrated case of Forbes v. Cochran, in 1824, goes somewhat into the history of the relation of the slave traffic with England, and asserts that during the reign of Queen Elizabeth she issued patents to encourage the trade, and these were followed up by acts of parliament expressly recognizing it. Acts were also passed during the reigns of William III and George II. Lord Mansfield refers to the opinion of Sir Phillip Yorke and Lord Chief Justice Talbot, whereby they obliged themselves to British planters for the legal consequences of slaves going over to England. He himself, with the same magic weapon, the law of nature of God's law, wiped out the institution in England once for all. Somerset's Case, State Trials, 201; Great Opinions by Great Judges, 112. The English cases discussing the subject of slavery in the English law are cited in Forbes v. Cochran, 2 B. & C. 448; 9 E. C. L. 138.

of society are the wants and fears of individuals; and, if it were not too cynical, one might almost be justified, in the light of history, in saying that man has had no other criterion for determining the law of nature than his own selfishness. The doctrine of the binding force of natural law as a legal doctrine is long since exploded; not but what there are some things in the law of nature recognized and enforced by all municipal codes, but these rules address themselves to the law-makers, while civil laws address the individual.

A false antithesis is made the ground for classification. Enough has been said to indicate the foundation upon which Blackstone rests this last clause of his definition, and somewhat of the force of the criticisms against it. But, as the basis of classification, the definition is subjected to still more serious criticism. Close attention and observation to Blackstone's text will suggest to the reader that in the definition Blackstone uses the words "right" and "wrong" as adjectives, but in the classification he uses them as nouns. This manner of using the words is much like "keeping the word of promise to the ear and breaking it to the hope." The transition from the adjective use of the words to their use as nouns is so bold and sudden that it requires an effort of the mind to detect that the same words in the two situations have entirely different meanings. In the definition, the words "right" and "wrong" are used to express the idea of abstract moral qualities as applied to certain acts (33).

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[33] Holland Jur. p. 73. Lord Russell's Address Am. Bar Assn, Rep. 1896, p. 260.

We might substitute that a law commands what is just, good, upright, and in conformity with "natural justice," and prohibits what is unjust, evil, bad, iniquitous, or contrary to "natural justice;" in which case it would, according to Blackstone, naturally follow that the law was divided into just and unjust, good or bad, etc. Chitty, Christian, Austin, Coleridge, and Judges Wilson and Cooley (34) all agree that this qualifying phrase is surplusage, and not true as a definition of municipal law. Coleridge, Judge, thinks Blackstone misquotes Cicero (35). It is apparent that, if we reject this phrase in the definition, or substitute other words for rights and wrongs, the primary division of the law, depending as it does upon the definition, falls out of Blackstone's analysis, because he says the division follows the definition. He says: "Because the law is a rule commanding what is right and prohibiting what is wrong, it follows that the primary and principal objects of the law are "rights and wrongs." But I cannot assent that the definition of law necessarily discloses the division of the whole body of law. Much less is there any association of ideas between the words, although the same spelling and sound; "right" and "wrong," when used adjectively, denoting an affirmative or negative quality of morality and synonymous with "good" and "evil," and the same words, when used as nouns, indicating something a man is entitled to. Rights are, by Blackstone, nowhere defined, nor their nature investigated (36), although they are the principal and

34 Notes to different editions of Blackstone, pp. 39, 44, 122.

35 Sharswood's Blk. 1, note.

36 Prof. Hammond's Introduction to Sandars' Justinian, p. 50.

primary objects of the law. "Rights" and "wrongs" are nouns. The latter conveys no ideas separable from the former. A wrong must have a right to operate against. Every rule of law in a body of municipal law involves a right, but not necessarily what is right; and under the head "Rights" all of the law might be classed. In fact, we know this is just what Blackstone really does, though he translated "jus" and "jura," in this connection, "right," while the words mean "law" (37).

Blackstone's real primary division, Book I, consists of the Rights of Persons; Book II, of the Rights of Things or Property, or the rights of persons concerning things, which is Blackstone's meaning; Books III and IV, the Law of Actions, Private and Public, meaning not, however, the rights and wrongs of actions, but, as he himself says, the means of obtaining redress and punishment. By classifying these actions under Wrongs, Blackstone does not intend that persons do not have a right to these actions or remedies. The subjects discussed in Book IV are punishments for violation of public rights. We know that the right to a hearing in court in vindication of any of our other rights is a constitutional right, and in reference to contracts constitutes their obligation, binding force, and indeed their only valuable attribute. Chief Justice Taney says: It is this remedy by an action in court which constitutes "the part of municipal law which protects the right, and the obligation by which it enforces and maintains it (38). . . . It is this protec-

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37 See Holland Jur. p. 73. Lord Russell's Address Am. Bar Assn. Rep. 1896, p. 260.

38 Actions Subordinate to Rights, 1 blk. 140.

tion which the clause in the constitution (sec. 9, art. 10) now in question mainly intended to secure, and it would be unjust to the memory of the distinguished men who framed it to suppose that it was designed to protect the barren and abstract right without any practical operation upon the business of life" (39).

Supposed reason for the definition. Prof. Hammond, in his recent edition of Blackstone, undertakes to refute the criticism of Christian, Wilson, Cooley, Sharswood and others, though admitting that they are almost universally followed, on the ground that they do not see, or they disregard, the importance of the clause as connecting this definition with Blackstone's classification, and undertakes to maintain that the definition is necessary for the purpose of the division made by Blackstone.

While it is perfectly obvious that this definition gives apparent color to the division, with all due respect to the distinguished editor's manifest learning, it is clear that he signally fails to show, either that this clause of the definition is required from the nature of the word defined, or that it is true in fact, or that the division was a natural or necessary one. The division was original with Hale, while the definition was taken from the civil-law definition of natural law. His note makes it quite plain that Blackstone, following Puffendorf, Hobbs and other authors back to the days of Cicero, attempts to

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39 Bronson v. Kinzie, 1 How. 311, 317. See also Cooley's Const. Lim. (6th ed.) 344, 350, citing dissenting opinions of Judges Washington, Thompson and Trimbell, in Ogden v. Saunders. 12 Wheat. 213; McCracken v. Hayward, 2 How. 608; McMillan v. McNeal, 4 Wheat. 209; Douglas v. County of Pike, 101 U. S. 677.

apply the Roman definition of natural law to municipal law, without observing the distinction that a natural law, being of divine origin, must necessarily conform to what is right, while municipal law, emanating from man, may or may not; for the simple reason that a body of men are no more certain to do right than an individual. This, so far from covering the point, is a departure from it. It is saying that, having classified into rights and wrongs, the definition is necessary. Hence law commands what is right and prohibits what is wrong, and from the definition the division follows; while the question is: Does a law always command what is right and prohibit what is wrong? Does it necessarily conform to what is morally right? If not, the definition is untrue. Neither is it true that all other classification is but auxiliary to this primary division, as contended by Prof. Hammond, or, in fact, that any classification is dependent upon the definition.

§ 49. **Blackstone's primary classification not adhered to by himself.** Notwithstanding the great pains to which he went to frame and defend his definitions of law and to demonstrate the material dependence of his classification of the law, as it relates to rights and wrongs, upon the definition, Blackstone does not, in reality, introduce any new arrangement, nor does his arrangement necessarily depend upon the closing phrase of the definition.

Professor Hammond, one of the most scientific editors, points out this fact quite clearly (40). The fact is that

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40 "Notwithstanding the care of Blackstone to connect the general plan of his work and its chief divisions with the definition of law given in the introduction (p. 44, as to which, see note 14, ante, p. 166), *the observant student will see that there is here a departure from that*

Book I of the Commentaries has to do with the various classes of legal entities and their personal relations in society—i. e., the status or personas of men as we shall see it explained in the next chapter.

This book does not treat of all the rights of persons, but only their personal rights (41) (i. e., Public Relations, Domestic Relations, and Status). In the sense in which he uses the word "person," the subject of the second book constitutes the Property Rights of Persons, and the third book the Right to Remedies Afforded, or the Auxiliary Rights, as he terms them.

This Classification Was Novel. Blackstone refers to no precedent for the formal arrangement, and none of his editors have pointed out any. The body intended to be treated and actually arranged was the law of England. The classification ostensibly made was of rights, but so artificially is it done that rights are apparently accorded to things (42).

§ 50. **The confusion results from inapt use of words.** "Jurisprudence," says Holland, "is specifically con-

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conception. He would naturally expect to find the body of the work consisting of a statement of the laws or rules which command or forbid the actions of man, and constituting thereby rights and wrongs; he would expect to find the character of these latter absolutely determined by the rule which commands or forbids them. On the contrary, the conception of a law, and especially the highest kind of law, natural or ethical disappears entirely from this point onward; that is to say, in the main body of the work. We have in its place the rights and wrongs themselves, originating, it is true, in that reason which is the common law, but rarely traceable to any distinct command." Hammond's Blk., p. 316.

41 We are excluding corporations for the present.

42 "Rights of Persons and Rights of Things." Hammond asserts that rights are not defined by Blackstone. Int. to Sandars' Juris., p. L.

cerned only with such rights as are recognized by law and enforced by the powers of a state. We may, therefore, define a legal right, in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others. That which gives validity to a legal right is in every case the force which is lent to it by the state. Anything else may be the occasion, but not the cause of its obligatory character. . . . This simple meaning of the term 'a right' is, for the purposes of the jurist, entirely adequate (43). It has, however, been covered with endless confusion, owing to its similarity to 'right,' an abstract term formed from the adjective 'right,' in the same way that 'justice' is formed from the adjective 'just.' Hence it is that Blackstone actually opposes rights in the sense of capacities to wrong —in the sense of unrighteous acts" (44).

Professor Hammond, himself an editor of Blackstone, and the one who has made the ablest attempt to defend him, says in his learned introduction to Sandars' Justinian (45), speaking of Blackstone's division into rights and wrongs: "As a scientific distribution, this is no doubt open to criticism, since a wrong can no more exist apart from right in law than a shadow without substance in optics, a negative without positive in logic." Again, at page 50 he says: "We confess that seems to us the weak side of Blackstone's entire system." Walker

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[43] See opinion of Chase, J., in Calder v. Bull, 3 Dall. *394, quoted by Webster, 4 Wheat. 516.

[44] Holland's Jur., 71, 72, 73.

[45] Page 48.

says a wrong always results from the violation of a right, so that by describing the one we indicate the nature of its opposite. A treatise, therefore, upon municipal law is for the most part a treatise upon rights and remedies, as one may choose to express it; and this suggests a remark upon Blackstone's primary division of legal subjects into rights of persons, rights of things, private wrongs and public wrongs. These expressions do not on their face indicate that remedies are to enter into the discussion. Moreover, the phrase "Rights of things," "Jura rerum," by itself conveys no definite idea, since all rights are the rights of persons; that is, they belong to persons, though they may have relation to other things (46).

Indeed, Blackstone is inconsistent with himself, because, he should have divided wrongs into wrongs of persons and wrongs of things. He says, in treating of private wrongs (47): "For, as these (wrongs) are nothing else but an infringement or breach of those rights which we have before laid down and explained, it will follow that this negative system of wrongs must correspond with the former system of rights. As, therefore, we divide all rights into those of persons and those of things, so we must make the general distribution of injuries (48) into such as affect the rights of persons and such as affect the rights of property" (49).

§ 51. **The right to redress in court is a right.** One ob-

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46 Walker's Am. Law, p. 47.

47 Book 3, p. 119.

48 Notice the change from "wrongs" to "injuries."

49 "Property" is now substituted for "things."

servation further will make the matter so plain that one can more readily see it.

If laws are to be classified under rights at all, under that head should be classed rights of action (50), or the right to redress in courts of justice, which Blackstone himself calls a right auxiliary to absolute rights, but without which the other rights would be useless and protected only by the dead letter of the law (51). He, however, treats it under the negative head of wrongs (52). No better illustration could be asked of Bacon's remark, "that men imagine that their reason governs their words," while in truth their words react upon the understanding, and, as a consequence, science becomes sophistical and inactive, and also of the words of Burke, "that studies become habits of thought," than is found in the confusion the definitions and forms of expressions, imbibed from Blackstone by students at the outset of study, has produced on their habits of thought.

A recent author, who has brought to the matter great learning and deep research, in his preface makes this candid statement: "When the author began the study of law, he was, like other students, bewildered by the confusion reigning in Blackstone's and other text-books with regard to the nature and general principles of private right" (53).

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[50] See 1 Wilson's Works, pp. 36, 46; Austin's Jurisprudence, p. 764; Bronson v. Kinzie, 1 How. 311, 317; Board of Education v. Blodgett, 155 Ill. 441; Campbell v. Holt, 115 U. S. 620.

[51] 1 Blk. Com. 141.

[52] In Book III.

[53] Smith's Right and Law, Preface, p. 7.

§ 52. **Municipal law defined.** Blackstone's confusion results from two things: first, an erroneous definition of law; and second, a labored attempt on his part to make it appear that the classification of legal subjects resulted naturally and necessarily from definition. Had he followed more closely his model (Hale), he would have avoided at least the charge of confusion. "By some philosopher," says Justice Wilson, "definition and division are considered as the two great nerves of science. But, unless they are marked by the purest precision, the fullest comprehension, and the most chastised justness of thought, they will perplex, instead of unfolding—they will darken, instead of illustrating, what is meant to be divided or defined. A defect or inaccuracy, much more an impropriety, in a definition or division, more especially of a first principle, will spread confusion, distraction and contradictions over the remotest parts of the most extended system" (54).

It must also be borne in mind that, there being many forms of government, there will be as many different ideas of municipal law. In a despotism the will of the ruler is law; in another form of government, that which is agreed upon by the people is law. It is useless to attempt to make one universal definition which will be suitable alike to Roman, to English, and to American jurisprudence. A definition cannot be given except after the most perfect conception of the subject of the definition. The truth is, no word can be truly defined until the exact idea is understood in all its relations which the word is

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54 Wilson's Works, p. 52.

designed to represent (55). Nevertheless, we will venture to define municipal law in American jurisprudence as the body of rules agreed upon by the people regulating the rights and duties of persons (56).

Judge Dillon says: "Law is the name for the body or system of rules, regulations, principles and enactments protected by the state and which the state will compulsorily enforce if required" (57). . . . "The thing to remember is that coercion by the State is the essential quality of law, distinguishing it from morality or ethics" (58).

From the fate which has attended prior definitions of the law, it would not be surprising if this one was found too narrow in this, or too broad in that, view (59); but in-

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55 Matthews' "Words, Their Use and Abuse," 23.

56 Huntado v. California, 110 U. S. 516. Several words in this sentence have a technical meaning, which must be understood before the definition readily defines; especially is this the case with the word "person." See 1 Wilson's Works, 89, 90. "That what is now called the common law of England was made up of a variety of different laws, enacted by the several Saxon kings reigning over the distinct parts of the kingdom; which several laws, affecting then only parts of the English nation, were reduced into one body and extended equally to the whole nation by King Alfred, appears from Fortescue's Preface; and that it is therefore properly called the common law of England, because it was done 'ut in jus commune totius gentis transiret.' But it had an ancienter origin than Edward the Confessor, and was at first called the foolright or people's right (for it is plain it could not be called the common law of Edward the Confessor's time, for then they spoke Saxon; nor in William the Conqueror's time, for then they spoke French), but it received this name when the language came to be altered. And Lord Coke (1 Inst. 142) says: 'The common law is sometimes called right, common right, common justice.'" Millar v. Taylor, 4 Burr. 2343, 2344.

57 Law and Jur., p. 21.

58 Id., p. 12.

59 See Dillon Law and Jur., p. 9.

asmuch as it is apprehended that no definition of the law, or a law, is essential to classification and analysis, we do not deem it wise to spend any more time here upon a definition (60).

§ 53. **Primary classification. The subjects of jurisprudence.** American law or jurisprudence has two primary objects, namely, municipal law and international law. These will constitute the main heads of the analysis, using the former term in its broadest sense, as used by jurists generally. These two great branches of law are not distinct and separate—they touch and support each other; but their orbit and sanction is different, quite as much so as that of national and state law.

The consideration of this subject may be appropriately closed by adopting, as indicative of the intention of the author, the language of Lord Hale as to his intended treatment of the same subject applied to English law: "Nor shall I confine myself to the method or terms of the civil law, nor of others who have given general schemes and analysis of law; but shall use that method and those words and expressions that I shall think most conducible to the thing I aim at" (61).

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60 Mr. George H. Smith, in his learned treatise on the Law of Private Right, where will be found a criticism of the common definitions of law, says: "But while even a perfect definition of the law would do but little to help us at the threshold of our inquiries, an incorrect definition, by giving us a false notion of the law and misleading us as to the method to be pursued in studying it, may do us infinite harm; and hence it will be necessary for us to examine at some length the various definitions that have been offered—so far, at least, as may be necessary to avoid being misled by them." Page xi.

61 Hale's Preface to Analysis.

CHAPTER V.

PERSONAL RELATIONS. THINGS. ACTIONS (1).

§ 54. **Leading words defined. Fundamental ideas explained.** In this chapter we shall endeavor to show and explain the ideas involved in the main heads to be adopted in the classification of the civil branch of American municipal law.

The chief obstacle encountered in such a discussion is the difficulty of conveying, in written language, the exact ideas intended.

Mr. Madison, in the Federalist (2), very aptly points out the impediment in the following language: "Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so

[1] The matters considered in this chapter, and examined with such minute care, are really the touchstones of the law. At every turn in practice they are encountered. Master them at the outset and the way is easy. Pass them over lightly, gaining only obscure ideas of their meaning, and the law seems a labyrinth, and the cases applying it a forest without order.

[2] No. 37.

copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be conceived, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered; and this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, as luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."

§ 55. **Suggestions on criticism, construction and interpretation.** This suggests a remark in reference to the spirit of criticism of the productions and writings of others—a remark equally applicable and useful in connection with the subject of construction and interpretation of laws or documents (3). Before condemning any one as inaccurate, erroneous or nonsensical, the position of the writer, the age in which he lived, the subject-matter, and indeed the very meaning of the words in the vernacular and idiom of the language of the time and place should be comprehended; and with this in view the author has taken the greatest pains not to do injustice to any of those whose language, expressions or efforts he is obliged to discuss in this and the preceding chapter.

On first reading, to a person of the present day and surrounded with the institutions and ideas which obtain

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[3] 1 Blk. Com. pp. 122, 123.

in the United States, Blackstone's language (4) seems jargon and to convey indefinite ideas; but it must not be forgotten that nearly a century and a half has elapsed since the words were penned, and because of the widely different principles of our government from those enunciated by Blackstone, a great change has elapsed since the words were penned, and because as ideas change, the meaning of words changes. "Nature's live growths crowd out and rive dead matter. Ideas strangle statutes" (5). Lord Coke says: "The principles of natural right are perfect and immutable, but the condition of human law is ever changing, and there is nothing in it which can stand forever. Human laws are born, live and die" (6).

In the present chapter we are obliged to discuss words which have been in constant use for centuries, associated with the same ideas, though ever changing somewhat in meaning to suit the requirements and notions of the age and people using them.

§ 56. **Meaning of leading words obscure.** Mr. Austin says: "Of all the perplexing questions which the science of jurisprudence presents, the notion of status or condition is incomparably the most difficult, and much of the obscurity in which it is involved arises from the way it has been treated by the modern commentators upon the Roman law" (7).

We may substitute for the word "status" in the above sentence the word "person;" for, if we do not find

[4] See Lyle v. Richard, 9 S. & R. 356.
[5] Wendell Phillips' Speeches and Lectures, 278.
[6] Calvin's Case, 7 Rep. 12, 13.
[7] Austin's Jur., 362.

them synonymous, we will find the two terms very intimately associated. This word "person," and its scope and bearing in the law, involving, as it does, legal fictions and also apparently natural beings, it is difficult to understand; but it is absolutely necessary to grasp, at whatever cost, a true and proper understanding of the word in all the phases of its proper use.

In the discussion of this question, two methods are admissible: one is to state the meaning of the words used as they obtain to-day without reference to what their meaning has been heretofore; the other is more like the method pursued in comparative jurisprudence, of showing the etymology and prior use of the terms in other systems, directly or remotely connected with our own. The latter course will be adopted; for while it may not have the same appearance of originality, and may detract somewhat from the literary style of the work, it will nevertheless put the reader directly in possession of the materials which prove or refute the argument; and a knowledge of the prior use of words is always of great value in a proper understanding of their present meaning.

§ 57. **Public and private law.** There have been various ways suggested of classifying municipal law, e. g., the written or statute law, and unwritten or common law. This classification depends upon the form in which the rules are expressed. Another division may be into substantive law, which amounts to the directory and declaratory part of the law and adjective or remedial law (8).

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[8] Austin's Jur., 797.

Still another classification is into public and private law (9). This latter division has some advocates and some apparent reason for the division (10). For example, public law relates largely to public relations; but upon investigation it will be found that the law cannot be presented in two separate bodies, and that the subjects classed under either of the general heads will be found embraced as subordinate to the general heads which are adopted (11).

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9 Ibid.

10 Holland's Jur., 109; Pomeroy's Const. Law. §§ 4-12.

11 Austin's Jur., 70, 751, 752, 777, 960. Austin says: "In rejecting the division of the law into public and private, and in classing political with other conditions, Hale, I believe, is original and nearly singular. In an encyclopaedia by Falck, a professor of law at Kiel, it is said that the authors of the Danish code, with those of the Danish writers who treat law systematically, observe in this respect, the arrangement observed by Hale. But in all the treatises by continental jurists which have fallen under my inspection, law is divided into public and private, though the province of public law is variously determined and described." Austin's Jurisprudence, vol. 1. p. 71. Again he says: "If, then, the law of political persons be opposed by the name of public law to the rest of the legal system, one of these absurdities inevitably ensues: either a bit of the corpus juris is opposed to the bulk or mass; or (to avoid that absurdity) the rest of the legal system must be appended to the public law; and public law, plus the rest of the legal system, must be opposed to that rest of the legal system from which public law is severed. * * * Agreeably to the view which I now have taken of the subject, Sir Matthew Hale, in his Analysis of the Law, and Sir William Blackstone, following Sir Matthew Hale, have placed the law of political persons (sovereign or subordinate) in the law of persons; instead of opposing it, as one great half of the law, to the rest of the legal system. Blackstone divides what he calls law regarding the relative rights of persons into law regarding public relations and law regarding private relations. Under the first of these he places constitutional law and the powers, rights and duties of subordinate magistrates, of the clergy, and of persons employed by land or sea in the military defenses of the state." Austin's Jur., vol. 2, pp. 776, 777.

This classification is proper as a theoretical division unaccompanied by an attempt at arrangement under particular heads; but the moment the application is made, the theory will be destroyed by the attempt at application—that crucial test which at last shatters all theories, however beautiful when abstractedly indulged. There is no body of public law which is separate from another body of private law.

The reason for the ancient classification was that the usages and customs of rulers were not laws in the same sense that the positive rules of law regulating the delegation of authority to magistrates are Law under modern governments. That this is the basic reason for the old classification is clearly set forth by Poste in his Elements of Roman Law, as follows: "Having been led to mention Public or Constitutional Law, it may aid to clear our conceptions if we observe that some of its dispositions are necessarily, and by nature of the case, deficient in the characters of Positive law. It is rigorously true to say that the powers of subordinate political functionaries are a status. They imply rights and duties on the part of superior and inferior, enforced by appeal to the common sovereign. But, when tracing the hierarchy of government, we come to the top of the scale; when we speak of the limitations of the sovereign power, we have passed from the sphere of Positive law. The sovereign is free from the fetters of positive law; he has no legal obligations, for they would imply a superior. Like a private individual who sets an ethical law to himself, the sovereign is not constrained to observe constitutional

law by aught that resembles a positive sanction. The existence of a law to bind the sovereign being assumed, the sovereign, the author of the law, can abrogate it at pleasure. Like the Aeschylean Jove, 'with his own fingers warping law,' 'with self-set law' the sovereign 'Sways uncontrolled;' or in the words of another poet, 'such the state's pleasure, whom no law restrains.' Nor has the sovereign any rights like those of a subject by positive law; and this absence of protection by positive sanctions may be expressed by the aphorism—the sovereign's might is his right. The sovereign body, of course, cannot emancipate itself from the law of prudence, nor from the ethical law, nor from the divine law, but these are the only laws from which it is not emancipated. Constitutional law cannot be enforced against the sovereign body by any but moral sanctions. Whereas, then, the law of Persons that belongs to private law is just as much positive law as the law of Things, and political functionaries who exercise a delegated power fall under a positive law of Persons, the absolute sovereign is not vested with legal status. When it approaches the limitations of the sovereign Constitutional law changes its character, it ceases to be positive law, and becomes a law of opinion; or, in other words, public law, so far as it relates to the sovereign, is not properly law, but only a collection of ethical maxims." (Poste El. Roman Law, Gaius, p. 42.)

The term Public Law as here used is inapplicable to our law. The United States has a government of law and all persons and all relations fall within it and are

subordinate to it. The distinction of the ancient conception and substitution of the new idea is the great achievement of our early publicists.

The conception of dividing the law into two parts, public and private, fails to observe the accepted doctrine of American law, that the body politic itself is a person (12), that all magistrates are persons, that all corporations are persons, that all individuals are persons, and that all rights cluster around and radiate from persons as they stand in some capacity or incapacity in which they are clothed by law. The recognition of this enables Hale and Blackstone to present a beautiful outline of English law. It is the strong side of their plan. It is sometimes said that constitutional law is not treated by Blackstone, but this is an error. All the recognized rules of constitutional law of England are in some form or other treated by Blackstone under the law of persons, very much of the same being again repeated under the law of wrongs—a defect which swelled the volume of his work and tended to confusion on account of the repetition.

Constitutional law is logically speaking a part of the law of persons or personal relations. In most treatises upon American law, the lack of an analysis of the subject such as that possessed by Hale and Blackstone prevents the treatment of the constitutional law of America under the law of persons, and this place has been taken by the title-head "Constitutional Law," to the utter con-

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12 There was formerly in England some obscurity as to who constituted the body politic—The People or Parliament as Blackstone affirms—but no such question is left in our law.

fusion, in fact, of all logical method in text writing, for the reason that there is no right, tangible or intangible, personal, or of property, which is not protected by the constitution. There is no authority, legislative, executive or judicial, which is not limited by the constitution. When subjected to examination it will be found that under the public law of these authors will be found the relations of men in regard to public matters, as Magistrate and People, and there will always be found that confusion contained in the statement of Professor Pomeroy that those rules (laws) which control the subject member of the state in the relations with the whole body ought in strictness to be ranged in the private law; but as these relations are public in their nature, the rules themselves are also considered as a part of the public law. On the contrary, if the capacities or incapacities, powers or duties of the public functionaries are treated directly in relation to their capacity as persons, we obtain exactly the notion we desire, namely: the identity of the alleged person, and the powers, duties, obligations and disabilities appended thereto by law; and I apprehend that upon investigation it will be found that the subjects classed under either the general heads public or private law will be found to be treated more analytically and specifically as subordinate to the general heads which we shall hereafter adopt.

"Public law," says the Institutes, "relates to the government of Rome." It also included criminal law, which is not treated in the Institutes (13).

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13 Austin's Jur., vol. 2, p. 778.

§ 58. **Ancient classifications.** The attempts to classify systems of law that have been attended with anything like success are those of Gaius, Justinian, Hale, and Blackstone. In the Commentaries of Gaius and the Institutes of Justinian, we have nothing on the subject of political relations excepting something regarding the sources of law. The analysis of Hale did not include the criminal law, as he had treated that subject in his "Pleas of the Crown."

All of these attempts at classification have proceeded upon what we believe to be true principle of legal analysis, namely: a classification of laws according to the objects to which the rules relate, or, as we might otherwise put the same idea, laws are to be classified according to the subject-matter of the law, each and all being intimately connected with the ideas and nomenclature of the law of the United States; and in many cases we will see terms borrowed from one or the other to express ideas not at all similar to the idea conveyed by the same word as originally used.

§ 59. **Persons and things.** It is not strictly true that Blackstone makes no use of the classification into Rights and Wrongs in the body of his work, as we shall presently see; for in chapter 1 of the Commentaries proper, he says: "Now, as municipal law is a rule of civil conduct commanding what is right and prohibiting what is wrong, it follows that the principal objects of law are Rights and Wrongs;" and in the prosecution of the Commentaries he professes that he will follow the very obvious division of the law into Rights and Wrongs, and

the title of the first book is "The Rights of Persons." He then proceeds: "Rights are liable to another subdivision; either, first, those which concern and are annexed to the persons of men and are then called jura personarum, or the rights of persons; or second, such as a man may acquire over external objects or things unconnected with his person, which are styled jura rerum, or rights of things.

He does not, however, classify wrongs as the wrongs of persons and the wrongs of things. This division of "rights" into rights of persons and rights of things is apparently based upon a supposed adherence to the arrangement of the Roman law, and also a translation of the Latin expression jura personarum and jura rerum as the rights of persons and the rights of things.

Gaius treats the subject under the title-head, "the division of the law," not the division of rights, his expression in Latin being, "Omne autem jus quo utimur vel ad personas pertinet, vel ad res, vel ad actiones," translated by Sandars, "all our law (not all our rights) relates either to persons, to things, or to actions" (14).

Austin has been criticized as using harsh language because he characterizes the translation by Hale and Blackstone of jura personarum and jura rerum, with rights of persons or rights of things, as mere jargon (15); but it must be remembered that it is a very serious defect in an institutional work to make use of any expression, without explanation, which it is necessary to explain before

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[14] Gaius, 1-8; Sandars' Justinian, 1-3; Austin's Jur., 983.

[15] Austin's Jur., p. 294, note.

it conveys an intelligent idea, and which, also, when explained to one acquainted with the vernacular in which the book is written, expresses an idea entirely different from the idea suggested by the words used.

There is no difference of opinion as to the meaning of the words jura personarum and jura rerum when used in these connections; all are agreed that in these situations these words mean law of persons or law relating to persons and law relating to things, and not the rights of persons and the rights of things (16).

The whole confusion in regard to rights and wrongs, and rights of persons and rights of things, results from Blackstone's transplanting the nomenclature and definitions of natural law, borrowed from Roman law, into England without the use of intelligent translation and apt explanation.

§ 60. **Rights of persons—Blackstone's meaning.** It has been claimed that this error in translation, rights of persons and rights of things, instead of laws concerning persons and laws concerning things, arises on account of ignorance, so far as Blackstone was concerned (17). If it is so absurd an error as claimed by Mr. Austin, Blackstone erred in good company, for he merely followed Lord Hale, who was at least the equal of any other lawyer of his day. That jura personarum and jura rerum could not properly be translated rights of persons and rights of things, but that the word "jura" in that con-

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16 See also Sandars' Justinian, Hammond's Int.; Holland's Jur.; Austin's Jur., 157, 376, 715, 761, 763, 983.

17 Austin's Jur., 71, 294, 715.

nection meant law, is perfectly clear; but that the expression used by Lord Hale, and followed by Blackstone, was ignorantly used, without a clear understanding of the meaning of the words used as qualified by them, is not at all apparent.

Christian, in notes to Blackstone's Commentaries, at this point says: "But the distinction of rights of persons and rights of things in the first two books of the Commentaries seems to have no other difference than the antithesis of the expression, and that, too, resting upon a solecism; for the expression rights of things or the right of a horse is contrary to the idiom of the English language. We say invariably a right to a thing. The distinction intended by the learned judge in the first two books appears in a great degree to be that of the rights of persons in public stations, and the rights of persons in private relations" (18).

Walker, in his treatise on American Law, says in regard to the primary division of legal subjects into rights of persons and rights of things: "Private wrongs and public wrongs. These expressions do not on their face indicate that remedies are to enter into the discussion; moreover the phrase 'rights of things' by itself conveys no definite idea, since all rights are rights of persons, i. e., they belong to persons, though they may have relation to other things" (19).

Judge Cooley says all individual rights are, or must be, rights of persons. They may be rights which concern

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18 Sharswood's Blk. 1, 122, note.

19 Walker's American Law.

their personal safety or liberty, or they may be relative rights pertaining to them as members of families or civil or political societies, or they may be rights to possess and enjoy animate and inanimate things. To speak of the right of things, though correct enough in the sense which it is hereafter explained, is likely to convey inexact ideas and is therefore misleading. By "rights of persons" we are likely to understand rights which belong to and are possessed by persons, but in that sense there could be no rights of things (20).

§ 61. Austin's misstatement of Blackstone's meaning. Austin says: But the distinction, as explained in the cited places, is not only founded upon a misapplication of language, and thereby involves the subject in obscurity; it is also inconsistent with the subsequent exposition which he gives of these same rights. According to the terms of the distinction, the rights of persons are such rights as men have to their own persons or bodies, freedom from bodily harm, etc., so that all such rights as a man may have in, over and to external objects (whether to other persons or things) ought, in pursuance to the same distinction, to have been excluded from the rights of persons and treated of nowhere but under the rights of things.

He instances husband and wife, father and child, as such rights as a man may have over external objects. In consequence of his misapprehension of the term "rights of persons," he has treated (Book I, chapter 1) rights to life, reputation, etc., with the obligation to

[20] 1 Cooley's Blk. (4th ed.), 122.

respect them, under the rights of persons, although, as being common to every status, it is manifest that they belong to the rights of things (21).

It is plain that Austin has not expressed the meaning of Blackstone's qualifying phrases. Blackstone does not say rights of persons are such as men may have to their own persons, but "which concern and are annexed to the persons of men."

§ 62. **Different views of Blackstone's meaning.** No better illustration of the confusion of ideas conveyed by the words of Blackstone, as contained on pages 122 and 123 of volume I of the Commentaries, can be given than will be found by comparing the notions of the meaning as given by the notes to those pages by Walker, Christian, Cooley and Austin with each other, and then with the explanation given by Prof. Hammond. The conclusions are quite different from each other, and each is different from the idea expressed by Prof. Hammond; the latter has expressed the meaning intended.

Let us compare briefly these notions.

Mr. Christian takes it that the distinction between rights of persons and rights of things commented upon in the first two books, is the difference between persons in public stations and in private relations. This is not correct, as will be seen by turning to the analysis as found in any edition of the Commentaries. It will be seen that the public relations are magistrates and people, and the private relations are master and servant, hus-

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21 Austin's Jur., 762.

band and wife, parent and child, guardian and ward. These, with the subject of corporations, are all embraced within the expression "rights of persons," and actually treated in Book I; while under the title-head "Rights of Things," in Book II, is treated the subject of "Property."

Mr. Walker understands that the phrase "rights of things" conveys in itself no definite idea (22).

Mr. Justice Cooley sees the matter as explained clearly enough, but he adds: "The language used is likely to convey inexact ideas, and therefore be misleading," adding: "By 'rights of persons' we are likely to understand rights which belong to and are possessed by persons," and that "in that sense there can be no rights of things." But, as we shall see, of possession, or belonging to, is not quite correct. The idea of Hale and Blackstone in reference to rights of persons is the difference in the conditions of men and rights depending thereon.

Professor Austin understands that "Blackstone's 'rights of persons' are such rights as men may have to their own persons or bodies."

Professor Hammond says Blackstone does not deserve the criticism and ridicule that has been spent on his sup-

[22] Walker says: "A treatise, therefore, upon municipal law, is for the most part, a treatise upon rights and remedies, or upon wrongs and remedies, as one may choose to express it; and it suggests a remark upon Blackstone's primary division of legal subjects into rights of persons, rights of things, private wrongs, and public wrongs. These expressions do not on their face indicate that remedies are to enter into the discussion. Moreover, the phrase 'rights of things,' pura rerum, by itself conveys no definite idea, since all rights are the rights of persons; that is, they belong to persons, though they may have relation to other things." Walker's Am. Law, p. 47.

posed mistakes, and asserts that in this passage he states, as clearly as any of his critics have done (23), that things are the objects and persons the subjects of rights (24).

The learned editor then submits eight pages of notes in explanation of Blackstone's meaning of these Latin expressions taken from the Roman law, and the English equivalents given by him, in which he shows clearly:

First. That the idea intended by Blackstone was different from that conveyed by the Latin expressions jura personarum and jura rerum.

Second. That the idea expressed by "rights of persons" and "rights of things," standing alone, did not convey to the English reader the idea intended by the author.

Third. That Blackstone had a definite idea which he intended to express by these words, and that the explanatory words did express the true meaning; and it is gratifying to find that Professor Hammond has given an explanation of the meaning of the expressions intended by Blackstone which seems reasonable and useful as applied to English jurisprudence.

Blackstone's explanation. What is the explanation given by Blackstone? All that there is, is found in the qualifying phrases following. "Rights of persons," he says, "are those which concern and are annexed to the persons of men; secondly, rights of things are such as a man may acquire over external objects or things unconnected with his person" (25).

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23 The critics have not explained at all.

24 1 Hammond's Blk. 330.

25 The use of the two words *objects* and *things* renders the phrase indefinite.

This explanation may be clear to one who has spent years in the investigation of legal subjects, and who has thereby become possessed of so much learning as to be able to explain not merely the ideas actually conveyed by the words used, but to arrive at the ideas intended to be conveyed by the person using them; but the explanation will be found by the uninitiated only to add to the confusion, for the reason that the rights of persons are said to be those which are annexed to the persons of men, and there is no explanation anywhere afforded by him of any distinction between the word "persons" and the word "men;" and the rights of things are confined to those which a man may acquire to external things; while he immediately points out that there are artificial persons that are not men, and yet may and do enjoy the right of things. Indeed, we have seen that three learned men, viz., Walker, Christian and Austin, have failed to get the true meaning as explained by Professor Hammond, which is submitted below.

§ 63. **The law of persons in English jurisprudence differs from the same in Roman law.** It is apparent that a proper explanation lies at the threshold of any analysis, and it is conceived that no progress can be made till the proper conception is had of the leading terms used. We have asserted in effect that the ideas contained in the expression found in Gaius and the Institutes, that "all our law relates to persons, to things, and to actions," are applicable to American jurisprudence as well as to the English and Roman.

In what sense does Blackstone use the expression

"rights of persons?" In the sense of rights belonging to persons? Or does he use the word "of" in the sense of "concerning or relating to?" That is determined by referring to the text.

The jura personarum, or "rights of persons," Blackstone explains to be those which concern and are annexed to the persons of men. The jura rerum, or rights of things, are such as a man may acquire over external objects or things unconnected with his person. This is an odd expression to use in a definition of the rights of persons, i. e., the rights of persons are the rights which concern the persons, to which is added the phrase "of men," making it read, "the persons of men," although "persons" seems to be used as equivalent to "man." Why not say, concern the persons of persons, or man of men, or simply men?

It will be seen that, in the first connection, the word "of" is used in the sense of "concern" and "relating to," instead of "belonging to," and the second are defined to be, not the right of things at all, but such rights as a man may acquire over objects and things not connected with his person. On another page, however, he says that certain absolute rights of individuals (not persons) are such as would belong to the persons merely in a state of nature, thus introducing another word, viz., individual (26).

Some authors assert that Blackstone did not understand what was intended by Gaius and the Institutes

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[26] 1 Blk. Com. p. 123.

(27); others, that the meaning of his expressions, if once thoroughly comprehended, was justifiable (28).

The commentator should have the benefit of the construction most favorable to him, that in using the expression "rights of things" he used this word "of" in the sense we have suggested, namely, "concerning" or "relating to," which will leave his expression less liable to criticism on that ground; and it would then appear that he had distinguished certain rights as relating to persons, and certain rights as relating to things, though we still have the expression that absolute rights of individuals are such as would belong to (not concern or relate to) their persons in a state of nature, and it is not made plain to us just what political or civil rights a man would have in a state of nature, and their absolute rights are plainly the civil rights of Hale, and such as we term "civil" rights (29).

Translating jura as "rights" instead of "laws" seemingly puts us in the situation of having persons and things alike the objects of rights (30), instead of having laws relating to persons and things, and we have not been told who is the possessor of the rights of persons or the rights of things. This is left to implication, and by reason thereof confusion and obscurity pervade

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27 Austin's Jur., lec. XL.; Holland, 71.

28 Hammond's Blk., note, p. 316.

29 See next chapter.

30 This is more in conformity to the Roman law than many who criticize Hale and Blackstone seem to realize. There is a real dominion over persons, e. g., husband and wife, parent and child, etc., but these are not rights in personam by the Roman law. They would be according to Blackstone's qualifying phrase. See next chapter.

what should have been the clearest part of the Commentaries.

Jeremy Bentham, in his remarks in reference to the inexact use of language by Blackstone in pages 47 and 49 of the Commentaries, says: "When leading terms are made to chop and change their several significations, sometimes meaning one thing, sometimes another, at the upshot perhaps nothing, and this in the compass of a paragraph, one may judge what will be the complexion of the whole context" (31).

§ 64. **The legal conception of leading words.** Inasmuch as the words person, man, thing, property, rights, wrongs and actions are leading terms constituting the designation of departments of the corpus juris, it will be impossible to obtain clear conceptions of subjects connected with these words until an understanding is agreed upon as to the sense in which these terms are used. If we arrive at the meaning of these words intended by Blackstone and make the same clear, we will have a better idea of his method and perhaps a better opinion of it, and at the same time will be able to show the distinction between the same words in the Roman, the English and in American law.

Blackstone apparently uses the Roman word persona as synonymous with the English word "person," and the latter word interchangeably with "individual" and "man," whereas he might have avoided all confusion by a closer adherence to that which he professed to follow.

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31 Fragment on Government, ch. 1, sec. 3.

§ 65. **The word "person" defined.** Gaius says "De juris devisione" [the divisions of the law] immediately preceding his division of the law; then follows, "De conditione hominum" [meaning the condition or status of men].

In the Institutes (32) "De jura personarum" precedes the expression "all our law relates either to persons, or to things, or to actions." The words persona and personae did not have the meaning in the Roman which attaches to homo, the individual, or a man in the English; it had peculiar reference to artificial beings, and the condition or status of individuals (33).

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[32] Liber 1, tit. 3.

[33] Sandars' Justinian, 1-3, notes; Austin's Jur., pp. 41, 157, 362, 363, 376, 715, 730, 762, 983.

Professor John Austin's View.—"Many of the modern civilians have narrowed the import of the term 'person' as meaning a physical or natural person. They define a person thus: 'homo, cum statu suo consideratus;' a 'human being, invested with the condition of status.' And, in this definition, they use the term status in a restricted sense, as including only those conditions which comprise *rights* and as excluding conditions which are purely onerous and burthensome, or which consist of duties merely. According to this definition, human beings who have no rights are not *persons*, but *things*, being classed with other things which have no rights residing in themselves, but are merely the subjects of rights residing in others. Such, in the Roman law, down to the age of the Antonines, was the position of the slave." Austin's Jur., vol. 1, 358.

The signification in Our Jurisprudence.—"The word 'person,' in its primitive and natural sense, signifies the mask with which actors, who played dramatic pieces in Rome and Greece, covered their heads. These pieces were played in public places, and afterwards in such vast amphitheatres that it was impossible for a man to make himself heard by all the spectators. Recourse was had to art; the head of each actor was enveloped with a mask, the figure of which represented the part he was to play, and it was so contrived that the opening for the emission of his voice made the sounds clearer and more resounding, vox personabat, when the name persona was given to the instru-

The word "homo" corresponds to the English word "man," and, as the Romans expressed it, "unus homo sustinet plures personas;" i. e., one man has many persons, or sustains many status, or many different conditions (34).

Austin says: "The term 'person' has two meanings, which must be carefully distinguished. It denotes a man or human being; or it signifies some condition borne by a man (35). A person (as meaning a man) is one or individual, but a single or individual person (meaning a man) may sustain a number of persons (meaning condition or status)" (36).

Notice that this meaning is not so broad as that given by Ortolan. It does not include artificial persons.

Again, he says: "As throwing light on the celebrated distinction between jus rerum and jus personarum, phrases which have been translated so absurdly by Blackstone and others,—rights of persons and rights of things, jus personarum did not mean law of persons, or rights of persons, but law of status, or condition. A person is

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ment or mask which facilitated the resounding of his voice. The name persona was afterwards applied to the part itself which the actor had undertaken to play, because the face of the mask was adapted to the age and character of him who was considered as speaking, and sometimes it was his own portrait. It is in this last sense of personage, or of the part which an individual plays, that the word persona is employed in jurisprudence, in opposition to the word man, homo. When we speak of a person, we only consider the state of the man, the part he plays in society, abstractly, without considering the individual." 1 Bouvier's Institutes, note 1.

34 Austin's Jur., 362.

35 See 4 Harv. Law Rev., 101.

36 Austin's Jur., 363.

here not a physical or individual person, but the status or condition with which he is invested. It is a remarkable confirmation of this that Gaius, in the margin purporting to give the title or heading of this part of the law, has entitled it thus: De conditione hominum; and Theophilus, in translating the Institutes of Justinian from Latin into Greek, has translated jus personarum . . . divisio personarum; understanding evidently by persona . . . not an individual or physical person, but the status, condition or character borne by physical persons. This distinctly shows the meaning of the phrase jus personarum, which has been involved in impenetrable obscurity by Blackstone and Hale. The law of persons is the law of status or condition; the law of things is the law of rights and obligations (37) considered in a general manner, or as distinguished from these peculiar collections of rights and obligations which are styled conditions and considered apart (38).

A moment's reflection enables one to see that man and person cannot be synonymous, for there cannot be an artificial man, though there are artificial persons. Thus the conclusion is easily reached that the law itself often creates an entity or a being which is called a person; the law cannot create an artificial man, but it can and frequently does invest him with artificial attributes; this is his personality, which we see and by which we are affected.

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[37] A word of caution is necessary here against accepting this statement as applicable to English and American law. See next chapter.

[38] Austin's Jur., 374.

The law does not distinguish between men except by their personality, as king or magistrate, or as parent or husband or wife, etc. While the idea may be difficult for the tyro to grasp, the personality, i. e., this condition or status of a man, is entirely the creation of the law. By nature all men are created free and equal, i. e., of equal rank, equal rights; but the law does not look upon all men as equal, though in the law of the United States all men have equal civil rights (39).

The question is asked, Who is that man? The reply would be, that is the king or lord so and so, or the chief justice or the president or governor. But what is the name of this personage? The name indicates the man, the title, rank or legal standing of the person.

The word "persons" denoted certain conditions of rank or status with which a man was clothed by law. To adopt the language of the same author, "the term 'person,' as denoting a condition or status, is therefore equivalent to character (40). It signified, originally, a mask worn by a player, and distinguished the character which he represented from the other characters in the play. From the mask which expressed the character, it was extended to the character itself. From characters represented by players, or from dramatic characters, it was further extended by a metaphor to conditions or status. For men, as subjects of law, are distinguished by their respective conditions, just as players, perform-

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39 See Ex parte Virginia, 100 U. S. 368.

40 Hale nowhere speaks of status, but uses the term "character" or "capacity." See note 60, below.

ing a play, are distinguished by the several persons which they respectively enact or sustain" (41). As we shall see, the word had a still broader meaning.

"A slave," says Holland, "having, as such, neither rights or liabilities, had in Roman law, strictly speaking, no 'status,' 'caput,' or 'persona.' On the day of his manumission, says Modestinus, 'incipit statum habere.' Before manumission, as we read in the Institutes, 'nullum caput habuit' " (42).

The following is the explanation given by Mr. Sandars in his translation of the Institutes: "The word persona had, in the usage of the Roman law, a different meaning from that which we ordinarily attach to the word 'person.' Whoever or whatever was capable of having, and being subject to, rights, was a persona. All men possessing a reasonable will would naturally be personae; but not all those who were, physically speaking, men, were personae. Slaves, for instance, were not in a position to exercise their reason and will, and the law, therefore refused to treat them as personae" (43).

"On the other hand, many personae had no physical existence. The law clothed certain abstract conceptions with an existence, and attached to them the capability of having and being subject to rights. The law, for instance, spoke of the state as a persona. It was treated as being capable of having the rights and of being subject to them. These rights really belonged to the men

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41 Austin's Jur., 363.

42 Holland's Jur., 81.

43 Slaves were not persons in the United States until after the abolition of slavery. 1 Hammond's Blk. 334, note.

who composed the state, and they flowed from the constitution and position of associated individuals. But, in the theory and language of law, the rights of the whole community were referred to the state, to an abstract conception interposed between these rights and the individual members of society. So, a corporation, or an ecclesiastical institution, was a persona, quite apart from the individual personae who formed the one and administered the other. Even the fiscus, or the imperial treasury, as being the symbol of the abstract conception of the emperor's claims, was spoken of as a persona. The technical term for the position of an individual regarded as a legal person was status" (44).

Ortolan's explanation of personality (45). The substance of the above was undoubtedly taken from Ortolan's treatment of the subject as given in his History of the Roman Law, which is submitted because it is clear and concise:

"The word 'person' (persona) does not in the language of the law, as in ordinary language, designate the physical man. This word in law has two acceptations: In the first, it is every being considered as capable of having or owing rights, of being the active or passive subjects of rights.

"We say every being, for men are not alone comprised therein. In fact, law, by its power of abstraction creates persons, as we shall see that it creates things, which do

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44 Sandars' Justinian, Introduction, p. 26.

45 Ortolan's History of the Roman Law is among the best. It is, unfortunately, not easily obtained.

not exist in nature. Thus, it erects into persons the state, cities, communities, charitable or other institutions, even purely material objects, such as the fiscus, or inheritance in abeyance, because it makes of them beings capable of having or owing rights. In the inverse sense, every man in Roman law is not a person. For example, slaves were considered as the property of the master, especially under the rigorous system of primitive legislation, because they are the object and not the subject of law. This, however, did not prevent the Romans from including them in another sense in the class of persons.

"We shall therefore have to discriminate between and to study two classes of personae: physical or natural persons, for which we find no distinctive denomination in Roman jurisprudence except the expressions taken from Ulpian, singularis persona (46); that is to say, the man-person; and abstract persons, which are fictitious and which have no existence except in law; that is to say, those which are purely legal conceptions or creations.

"In another sense, very frequently employed, the word 'person' designates each character man is called upon to play on the judicial stage; that is to say, each quality which gives him certain rights or certain obligations—for instance, the person of father; of son as subject to his father; of husband or guardian. In this sense the same man can have several personae at the same time. In this respect he resembles the player in a comedy or drama" (47).

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[46]Does not this equal "individuals?" See 10 Harvard Law Rev., 101.

[47]Ortholan's History of Roman Law, 567-68.

The last two paragraphs embrace all that Austin gives us in the quotation given above.

From what we have seen, the following conclusion may be drawn: The words persona and status were not synonymous, though very nearly so. The word "person" had two meanings:

First. Every being, artificial or natural, capable of having or owing rights.

Second. The characters, capacities, qualities or positions which the law ascribed to certain men as individuals —that is, rank, condition, capacity—status.

The technical term for the second meaning, namely, the position, quality, character which a man bears, is status.

Status is not so broad as person, but always related to physical men.

A slave had no rights, no rank, no standing, no capacity, and consequently no status. This applies, of course, only to the earlier days of Roman law, for subsequently slaves were given a standing as men.

"In the earlier days of Roman law," says Sandars, "no one would have conceived this to be unnatural" (48).

In the days of Gaius, it seems, slaves are treated as persons, for he says: "Persons are freemen or slaves" (49).

In England all men were persons, and were divided into certain classes or ranks by virtue of which they had

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[48] Sandars' Justinian, Int., 27; Austin's Jur., lect. 12, p. 358.

[49] Gaius, 1-9; Austin's Jur., 358.

especial characters, capacities, rights, privileges and immunities; for instance, the right of magistracy, as king, as lord, etc. These were artificial. In human societies men have certain standing, position, capacity, according as they are sovereign or subjects, parents and children, husband and wife, or citizens

We have seen something of the etymology of the word, also its meaning and application as used in the Roman law. We know that the word "person" is a familiar one in English literature, both in England and America. We are endeavoring to ascertain whether in the English language we have a right to oppose persons to things for the purpose of classification of rules of law, and if thereby we convey intelligent ideas.

We know that all laws emanate from persons, and also that they operate against or upon persons (50); that is, all law certainly addresses persons. So of rights. We know that rights belong to persons, and that in that sense there cannot be the rights of things. It should be borne in mind that we are endeavoring to classify the body of laws, and not the rights which are resultant from laws, and that the principle of classification adopted is the difference in the objects to which the rules relate.

There can be found in the Commentaries of Blackstone no definition of the word person, nor any explanation of the meaning intended to be ascribed to the word "per-

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50 Virginia v. Rives, 100 U. S. 332; 92 id. 554; United States v. Harris, 106 id. 629; Civil Rights Cases, 109 id. 3. A state may in a sense fall under the designation, and laws be directed against states; but as the state acts by individuals, in the same manner it is operated upon through individuals.

son,'' and the word is there used indiscriminately in the popular and legal sense, interchangeably with ''man'' and ''individual,'' and also to designate artificial beings capable of having rights; and there is not the slightest hint that in using the Roman expressions there is any change intended from the Roman idea of the word ''person,'' though he does treat under the rights of persons what he styles absolute rights, which would be called ''things'' in Roman law.

§ 66. **Scope of the word ''thing.''** Of things (51), which is the subject of the second book, Blackstone says: ''The objects of your inquiry in this second book will be the jura rerum, or those rights which a man may acquire in and to such external things as are unconnected with his person.'' Why not say unconnected with him, himself? These are what the writers in natural law style the ''rights of dominion or property.'' This is the only definition given of the words ''property'' or ''thing;'' that is, the jura rerum equals those rights which a man may acquire in and to external things. Otherwise put, the rights of things are rights which a man may acquire to things unconnected with his person; and these are what writers in natural law style property; yet in the treatment of this subject the learned commentator treats the subject of contracts, the main feature of which is its obligation, or, in other words, the power which the law affords one person of enforcing it by

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51 Observe the word "chose," which will be explained hereafter. Its meaning has an important bearing on the modified meaning of both "person" and "things."

compelling another person to perform it, or awarding damages for its breach by an appropriate action by one person against another.

The inquiring student will ask, Is a thing property, and are all things property? and if the word "thing" shall be held to embrace any rights not having a tangible object, why are not the rights of personal security, personal liberty and private property embraced within the word "things?" In the case of Chisholm v. Georgia (52), Justice Wilson, being obliged to discuss the meaning of "states" and "sovereigns" in politics as applied to the jurisprudence of the United States, said: "In the place of those expressions, I intend not to substitute new ones, but the expressions themselves I shall certainly use for purposes different from those for which hitherto they have been frequently used."

Such, it is apprehended, is exactly what Hale and Blackstone did. In reality, they ascribed new and different meanings to words taken from the Roman law, either broader or narrower than the meanings of the same words in the Roman law, and they did arbitrarily mistranslate jura, meaning law, to rights, to suit the purpose.

So, in the prosecution of this work, in many instances we will find words which were in common use in the English law before the Revolution, which are now used in the jurisprudence of the United States with meanings very different from their old meanings; and the purpose of these inquiries as to the meanings of these words

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[52] 2 Dall. 421.

is to avoid confusion by ascertaining the appropriate meanings of the terms. It is for this reason that we investigated the meaning of these words in the Roman law and as used in English law by Blackstone.

§ 67. **Ortolan's explanation of "things."** Volumes have been written on this subject, but I believe no authority is considered better upon the meaning of words in the Roman law than the opinion of Ortolan; and, as he expresses himself in the clearest and most concise manner, his explanation of the meaning of the word thing is submitted (53).

"The word 'things' (res), even in law, is a flexible word, which lends itself with marvelous facility to the wants and whims of language. The question for us is its legal sense.

"In the same manner as the word persona designates in law every being considered as capable of becoming the active or passive subject of right, so the word res designates everything which is considered susceptible of forming the object of rights; and in this category is included everything which man, the universal dominator, has been able to regard as subject, or at least destined to minister, to his wants and his pleasures; for, in reality, the end which a man proposes to effect by the exercise of rights is the satisfaction of his wants and the enjoyment of reasonable pleasures, either in his moral or physical perception (54).

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53 The work is quite scarce; I believe out of print.

54 The Declaration of Independence enumerates among inalienable rights, "life, liberty, and the pursuit of happiness."

"We say everything—for physical and material objects are not alone comprised in it. In fact, just as there are persons of purely legal creation, so there are things which do not exist in nature, and which law alone has created. Law, by its power of abstraction, creates things as well as persons. Finally, if law sometimes raises purely material objects to the rank of persons, it sometimes inversely lowers man to the rank of things; such, for instance, are slaves, when they are considered as subjected, or as devoted, to the purpose of satisfying the wants of other men, incapable of being, in the relation of slave to master, the subject, but the object of rights.

"If what we have just said about things is compared with what we have already said about persons, it will be seen at once that the two cases are parallel.

"Roman jurists, indeed, have not laid down the definition of 'things' in the same wide and philosophical terms that we have adopted, which include everything which can be the object of a right; not only corporeal things, but also acts, the status of persons in different conditions, and, in general, all rights. Their ideas were at first directed to regarding things (res) as corporeal objects, which, being of some use or other to man, could form in relation to him the object of a right; but they afterwards extended the use of the word so as to make it include abstracted ideas—objects of purely legal conception" (55).

From this it will be seen that the Latin scholar who was acquainted with the Roman meaning would not have

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55 Ort: Rom. Law, 570 et seq.

obtained from reading the words jura personarum and jura rerum anything like the same ideas which Blackstone has ascribed as the meaning of these words.

"Rights," says Professor Hammond, "are (by Blackstone) nowhere defined or their nature investigated. It seems as if he would have dropped the term altogether if he could have done so without a tedious circumlocution" (56).

Blackstone does, in effect, define property to be "rights such as a man may acquire over external objects or things unconnected with his person" (57).

§ 68. **The division of subjects into rights and wrongs discarded.** Hale gives no reason for the division into rights and wrongs excepting the translation of jura personarum and jura rerum into rights of persons and rights of things, instead of law concerning persons and law concerning things. Blackstone went to great pains in order to prove that this division into rights and wrongs resulted

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[56] Sandars' Justinian, Hammond's Introduction, p. 50.

Definitions of Rights.—"Jurisprudence is specifically concerned with such rights as are recognized by law and enforced by the power of the state. We may therefore define a 'legal right,' in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others." Holland's Jur., p. 71.

Chase, Justice, says: "When I say that a right is *vested* in a citizen, I mean that he has the power to do certain actions according to the law of the land." Calder v. Bull, 3 Dall. 394.

This definition is quoted by Webster in argument of the Dartmouth College Case, 4 Wheat. 516.

For exhaustive and scientific investigation of the jural conception of rights and a right, the student may consult Smith's Right and Law and the Law of Private Law. These works are small in size, but are among the most profound treatises by authors of our own land.

[57] 1 Bl. Com. 122; 2 Id. 1.

naturally and necessarily from the definition of natural law, which is adopted as his definition of municipal law.

The division of the law as it relates to rights and wrongs, and again into rights of persons and rights of things, is but a change in form; the change is merely substituting for actions that concerning which actions are brought, viz., wrongs, and translating the Roman word jura, meaning law, into rights. Going back to the old form by translating jura into law, and using actions or remedies instead of wrongs, then we find that the laws of England do concern persons, things, and actions;—the substitution results from Blackstone's method analyzing rights instead of law.

§ 69. **The agreement and divergence between Hale and Blackstone.** Blackstone followed Hale in something more than a mere matter of form. Hale's treatment of the subject of right is as follows:

"Civil rights are of two sorts—jura personarum, or rights of persons, and jura rerum, rights of things. Civil rights of persons are such as do either immediately concern the persons themselves, or such as relate to their goods and estates (58).

Origin of Absolute Rights. "As to the persons themselves, they are either persons natural, or persons civil or politic; i. e., bodies corporate.

Persons natural are considered two ways: Absolutely, and simply in themselves; or, under some degree or respect of relation.

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[58] Hale's Analysis, sec. 1.

In persons natural, simply and absolutely (59) considered, we have these several considerations, viz.:

The interest which every man has in himself.

His capacities, or abilities (60), which respect his actions.

The interest which every person has in himself principally consists of three things, viz.:

The interest he has in the safety of his own person; and the wrongs which reflect upon that, are assaults, —affrays,—woundings.

The interest he has in his liberty or the freedom of his person; the injury whereto is duress and unlawful imprisonment.

The interest he has in his name and reputation; the injury whereto is scandal and defamation.

As to the other interest of goods and estate, though in truth they have a habitude, and are under some respect to the person, yet, because they are in their own nature things separate and distinct from the person, they will more properly come in under jura rerum (61).

§ 70. **Lord Hale's treatment of status.** "The capacity that every person has, which is a power that the law variously assigns to person, according to the variety of certain conditions or circumstances, wherein they are, either to take or to dispose.

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59 This is not saying that the persons are absolute, or that the rights are absolute, but it throws light upon how Hale uses the word "absolute," and this is the only reason for Blackstone's absolute rights. He might as well have said absolute persons or things as absolute rights. See post, ch. 4.

60 This is the same as status.

61 This is the keynote to the classification, "Rights of persons and rights of things."

And under this head we have—

First, the capacities themselves, which are especially two:

Capacities which a man has in his own right.

Capacities which he has in auter droit, or another's right.

Now, capacities which a man has in his own right are, either—

To acquire or take.

To alien or transfer.

And both these are either—

Of things personal.

Of things real.

The second kind of capacities are in auter droit, in another right; as executors, corporations, cestuy que use, etc., whereof hereafter.

The various conditions or circumstances of persons with relation to those capacities, consisting of—

Ability.

Non-ability.

And all persons are presumed in law able in either of those capacities of taking or disposing who by law are not disabled; and those that are so disabled come under the title of non-ability, though that non-ability is various in its extent, viz.: to some more, to some less, as in the several instances following:

Aliens; here comes in the learning of aliens, as naturalization, denization, etc.

Attainted of treason or felony; here of attainders.

Persons outlawed in personal actions.

Infants; here of the non-ability of infants.
Feme coverts; here of their disability.
Idiots and lunatics; here of that learning.
Persons under some illegal restraint or force, as duress, madness.
Villeins (now antiquated).
Bastards; and here of legitimation (62).

§ 71. **Lord Hale's conception of "things."** Again at section 23, the title of which is "Concerning the jura rerum," he says: "And although the connection of things to persons has in the former part of these distributions given occasion to mention many of those jura rerum as particularly annexed to the consideration of persons under their several relations, yet I must again resume many of them, or at least refer unto them; and this without any just blame of tautology, because there they are considered only as incidental and relatively; but here they are considered absolutely—in their own nature or kind, and with relation to themselves, or in their own nature, and the several interests in them, and transactions of them."

Obviously Hale's treatment does not warrant the criticism that he ascribed rights to things. He plainly says: "Civil rights of persons are such as do concern the persons themselves or such as relate to their goods and estates" (63). This leads one to believe that Professor Austin did not diligently endeavor to ascribe a reasonable meaning to the treatment of the subject by Hale as followed by Blackstone.

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62 Hale's Analysis, sec. 1.
63 Hale's Analysis, sec. 1.

§ 72. **Substantial difference between Hale and Blackstone.** The difference, in substance, between Hale and Blackstone's treatment and the treatment of the same matter in the Roman law consists in this: that inasmuch as all objects of rights, tangible or intangible, which the law protected, were under the Roman system "things," and consequently would fall under the jura rerum or law of things, Hale and Blackstone transferred from the law of things to the law of persons all such rights as do immediately concern persons themselves, and left under the rights of things interests of persons in goods and estates, and obligations from others, because they are in their own nature things separate and distinct from the person, as put by Hale, or external objects unconnected with the person, as put by Blackstone.

§ 72a. **The English conception of these words.** Dr. Hammond says: "And if our belief as to Blackstone's true meaning and method be the correct one, he could finally have informed Mr. Austin that what he proposed to do in the Commentaries was to transfer to the law of persons, or to locate in the proper place among the rights of persons, all such rights (and duties) as belonged to all persons alike, except such as had for their object 'external things unconnected with the person.'

"This last is in truth the cardinal point of the whole matter. Blackstone adopts (he should have said, from Hale) as his definition of a 'thing,' one quite different from that employed by the classical jurists; and all the departure from civilian precedent that can fairly be

charged to him depends on, and is to be explained by, this changed sense in which he uses the word 'thing' " (64).

Blackstone's use of the word "thing," if we have attended his language, is "external objects unconnected with the person." These objects are not always tangible, as we shall see later, though they were termed personal property or choses in action.

Dr. Hammond says: "Things are objects of rights, and, since Blackstone's time, the term has been confined in our law to external things unconnected with the person, such as land, chattels personal, etc." (65).

This is misleading, perhaps, in ascribing those changes to Blackstone. Dr. Hammond continues: "Prior to Blackstone's time the term 'things' had a much wider comprehension; it was identical with the objects of a right, whether that object had a tangible existence or not. Health, liberty, reputation were things in this sense; and even the indefinite imaginary objects of obligations, having no real existence, were also included under the term" (66).

Dr. Hammond is not accurate as to the time when this change in the meaning took place. One would suppose that Blackstone ascribed a new meaning to the words "persons" and "things," and recast the law of England in conformity therewith, whereas he only followed Hale in the use of these terms, and in so doing has received some criticism; and it would seem but fair for a person living in a later age to presume that Hale ascribed to

64 Sandars' Justinian, Introduction by Hammond, pp. 55, 56.

65 Hammond's Blk. 332, note.

66 Id. See next chapter.

these words a meaning which was natural and in conformity with the English use of terms. We are not, however, left to a matter of presumption.

§ 72b. The word "chose" unknown in Roman nomenclature. It is only necessary to examine the Commentaries of Blackstone and to remember the prior history of English law to understand that by including under the term "things" only those objects of rights which were denominated in the English law either real estate, chattels or choses in action, Hale and Blackstone did no violence to the vernacular of England. The word chose was a French (or Norman-French) word, and, though its derivation is from the Latin causa or thing, its meaning corresponded to the things personal, in possession and in action as used by Hale and Blackstone. Undoubtedly, this is one of the ideas which grew out of the Norman-French occupation of England which was inaugurated by William the Conqueror (67). When we contemplate lands and chattels, and then add to it what was embraced within the word chose in possession and chose in action, you have bounded the objects included by the word "things" in English law.

A chose in action was a right to receive or recover a debt, or money or damages for a breach of contract, or for a tort connected with a contract or connected with chattel property (68).

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67 See 1 Schouler, Personal Prop. (2d ed.), § 11.

68 See 1 Wilson's Works, 46; Bouvier's Dictionary; Gillett v. Fairchild, 4 Denio, 80; 2 Kent, Com. 351, "The term *'chose in action'* is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to

§ 73. **The American idea of a right.** As it has been asserted that Blackstone has nowhere defined rights or property, it will be well for us to arrive at the meaning of these two words. We have seen the definition of Holland that "a legal right is a capacity resting in one man of controlling, with the assent and assistance of the state, the actions of others" (69).

But inasmuch as the conflict may be between the state and the person, this definition will hardly do in American jurisprudence. The state is not the controlling force in our theory of jurisprudence; it is but one of the persons having and owing rights. We claim to have a government of law, not of men.

Perhaps the definition given by Justice Cushing, with Judge Kent's addition, comes as near being correct as anything to be found: "When I say that a right is vested

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recover a personal chattel or a sum of money from another by action. It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment in a court of law. Yet even there he is considered as having but a chattel interest, while the mortgagor is treated as the true owner." Sheldon v. Sill, 8 How. (U. S.) 449, 450.

"Blackstone seems to have entertained the opinion that the term *chose*, or thing in action, only included debts due, or damages recoverable for the breach of contract, express or implied. (2 Blk. Com. 388, 396, 397.) But this definition is too limited. The term chose in *action* is used in contradistinction to chose in *possession*. It includes all right to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of contract, express or implied. In both cases, the debt or damages of the owner is a 'thing in action.' (2 Kent, 351; 1 Chit. G. P., p. 99, note; Tomlin's L. D., 'Chose;' The King v. Capper, 5 Price, 217; 1 Lilly, Ab. 378.)" Gillett v. Fairchild, 4 Den. 80-82. See Mex. Cent. Ry. v. Davidson, 157 U. S. 201.

[69] Holland's Jur., 71. This definition may be too narrow as to claims *against* the state. Hanley v. Schwalby, 147 U. S. 518.

in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land" (70). Kent adds, "or to require from others" (71).

§ 74. **"Property" defined.** The word "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy and dispose of a thing (72). The term "property" is often used to indicate the res, or subject of the property, rather than the property itself; but this is not its proper legal sense (73).

Judicial definitions.—The following definitions, made by courts while considering rights of property in a variety of situations, will make the legal idea of property clearer:

National Supreme Court. "The words 'life, liberty and property' are constitutional terms, and are to be taken in their broadest sense. They indicate the three great sub-divisions of all civil rights. The term 'prop-

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70 Calder v. Bull, 3 Dall. 386.

71 1 Kent. Com. 549; Wynehamer v. People, 13 N. Y. 378, 433.

72 Rigney v. Chicago, 102, Ill. 77; Austin's Jur., 817.

73 Eaton v. B. C. & M. Ry., 51 N. H. 504; s. c., 12 Am. Rep. 147.

Property.—John Marshall (afterwards chief justice of the Supreme Court of the United States), speaking of the legal conception of property, said: "It is not necessary to inquire how the judicial authority should act, if the legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject in all respects to the disposition and control of civil institutions. * * * It must be repeated that the law of property in its origin and operation is the offspring of the social state, not incident of a state of nature." Argument, Ware v. Hylton, 3 Dall. 211.

erty' in this clause embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere technical property, but extends to every species of vested right'' (74).

The New York Court of Appeals. ''Now I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. 'Every man might then take to his own use what he pleased, and retain it if he had sufficient power; but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.' Tomlins' Law Dict., Property; 2 Blk. Com. 34. Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.'' Wynehamer v. The People, 13 N. Y. 396.

Illinois Supreme Court. ''Property in its broadest and most comprehensive sense includes all rights and interest in real and personal property, and also in ease-

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74 Camp v. Holt, 115 U. S. 620.

ments, franchises and incorporeal hereditaments. That which may be taken for public uses is not exclusively tangible property." Met. City Ry. Co. v. Chicago W. D. Ry. Co., 87 Ill. 324.

"Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution; yet the term is often used to indicate the res or subject of property, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression 'physical injury,' while at other times it is probably used in its more appropriate sense, as above mentioned (75).

New Hampshire Supreme Court. "In strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right . . . over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' Selden, J., in Wynehamer v. People, 13 N. Y. 378, 433; 1 Blk. Com. 138; 2 Austin's Jur. (3d ed.) 817, 818.

"If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of

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75 Rigney v. Chicago, 102 Ill. 77. See Board of Education v. Blodgett, 155 Ill. 441.

indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property without which absolute property can have no legal existence. 'Use is the real side of property' " (76).

Missouri Supreme Court. A man may be said to have a special property in his possession or calling by means of which he makes his support, and he can be deprived of it only by due process of law (77).

Horses and cattle and land were created by nature. "Property," strictly speaking, is an artificial conception of man.

"It seems to me," says Justice Cushing, "that the right of property in its origin could only arise from compact express or implied, and I think it the better opinion that the right as well as the mode or manner of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society; it is regulated by civil institutions, and is always subject to the rules prescribed by positive law (78).

ILLUSTRATIVE EXAMPLES.

The definition of property is asked for.

The answer is: the right or interest which one has in or to a thing which may be the subject of property.

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76 Eaton v. Boston, Concord & Montreal R. R., 51 N. H. 504; s. c., 12 Am. Rep. 151.

77 Blair v. Ridgely, 41 Mo. 173; 97 Am. Dec. 248.

78 Calder v. Bull, 3 Dall. 386. "A vested cause of action is property, in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it (the cause of action) *springs from contract* or from the principle of *the common law*, it is not competent for the legislature to take it away." Cooley's Const. Lim., 443, quoted in Board of Education v. Blodgett, 155 Ill. 441.

Is a horse property? Here the answer should be: not in the strict and technical sense; a chattel, whether it be a horse, or a chair, or desk, or automobile, or a locomotive, is the subject of property.

The property is the right or interest which one has in it, thus several may have an interest in the same chattel.

The owner of an automobile may desire to borrow money upon it. He gives a chattel mortgage and retains possession. In such case two people have a property interest in the automobile, the mortgagor and the mortgagee.

The same illustration is applied to land. The land is the subject of property, and in the law of real property this property right is called an estate or interest in land.

ANOTHER ILLUSTRATION.

The legislature of a State passes a statute taking away or restricting the right to sell property of any kind. Such a law is considered as taking, to the extent provided, the property, although the thing which is the subject is not touched. Such acts can be justified only by some legal reason, as the police power, and such laws must operate equally upon all for such a law deprives one of a right which is property.

ANOTHER EXAMPLE.

In the complex state of our society there are a great many public service corporations, i. e., corporations supplying water, light, gas, transportation, etc.

The legislature acting on behalf of the public quite frequently assumes the power to regulate the rate, i. e., fix the price which the corporation shall charge the persons whom it serves. Such laws always involve some

supposed curtailment of the absolute right which, but for the law, could be fixed by private contract.

So such legislation is frequently attacked because it is said the property of the company is taken. Such was the controversy in the recent important case in New York, called the Eighty Cent Gas case.

Such laws have been quite generally upheld, and always so unless the law is unreasonable.

§ 75. **Concluding observations.** We have now seen the meaning of the words "law" and "rights," and that rights are creations of law.

We have also seen that the words "person" and "thing" and "property" have each, in legal parlance a meaning different from the meaning often ascribed to them in common parlance.

"Person" is to be distinguished from "man" and "individual," though including them.

"Property" is not at all synonymous with "things," but relates to the right or interest in them; and the word "thing," in English and American jurisprudence, has a meaning broader than the common use of the word "thing," and narrower than the Roman use of the word "res."

In our jurisprudence it included those objects which were denominated choses in action, and excluded all rights of a purely personal nature. Blackstone's description of property, and his treatment of it, correspond very nearly to the notions as they obtained in England in his day. He clearly indicates that he does not treat a horse, or land, or a chose, as property, but as the subjects of property.

CHAPTER VI.

RIGHTS, DUTIES, OBLIGATIONS AND REMEDIES.

§ 76. Importance and confused condition of the subject. In the whole range of English juridical literature one will look in vain for an adequate treatment of the jural ideas involved in the words Right, Duty, Obligation, and Injury. The best is that of Spence, but from the fact that it is made but an incident to his history of the rise and progress of Equity Jurisdiction it has not attracted the attention it deserves, for Spence's performance is perhaps the greatest British law book of the Nineteenth Century. The reader who has followed the preceding pages need hardly be told that within these four words must be found the most vital principles of the law—for it is clear that the establishment of these upon a clear, fixed and stable foundation with appropriate means of protection and redress is among the principal functions of all law. No apology need therefore be offered for treating these subjects carefully, even minutely; on the contrary no one who aspires to know the law can excuse himself from knowing the meaning of these fundamental words.

In the preceding chapter an endeavor was made to present the legal conception of the terms which designate the three departments into which the Roman jurists di-

vided the great body of the civil law—person, thing, action.

The changed meaning ascribed to the same expressions by English jurists is there also pointed out, and it is shown that subjects are by the latter transferred from one department of law to another, according to the differing conception of these words.

In the course of that discussion the word "Right" was defined, and the word "obligation" mentioned in connection with the Roman distribution of rights of persons.

The word chose was also introduced as a word adopted into the English law from a source other than the Roman law, and that these were divided into choses in possession and choses in action.

The English conception of these words, quite different from the meaning ascribed to them in the Roman law, resulted in radical departures in formal arrangement of English treatises.

The adoption of a new classification of certain rights under the designation choses in possession and choses in action, and the subordination of one of the great departments of the Roman classification, viz., obligation, brought about radical changes in the nomenclature.

New conceptions of the nature of property, ownership or dominion with the use of the expressions real and personal to designate respectively rights in land and in movable things and choses, rendered the expression of the English law by the English jurists, who uniformly persist in making use of words borrowed from the civil law with an entirely new meaning, simply distracting to a

civilian, and only intelligible to an English reader by the use of labored qualifying phrases.

The American student encounters all of these difficulties and others in addition, occasioned by reason of new elements introduced and still further changes and variations in the meaning of old words.

It will perhaps facilitate the understanding of the nature and classification of rights and obligations to present briefly the ancient meaning and classification of these words in the systems whence they are derived.

In the last chapter we saw that Blackstone translated jura personarum rights of persons, and jura rerum rights of things. To these words he added the qualifying phrases, segregating rights into two primary classes: Those "connected with the persons of men" and those "unconnected with his person."

All the changes from civilian methods result from these changes—the perverted use of person and the new conception of res.

DR. HAMMOND'S EXPLANATION.

"In the classical jurists, and among civilians generally (until within the last century), the term res and the term 'object of a right' are strictly synonymous. No right could be conceived the object of which might not be designated res. The right of a man to security, to liberty, to reputation, to health, had for the object of each, respectively, a 'thing'—res—although that 'thing' was merely the right itself, so to speak, objectified. Hence these rights, as well as any others, could be included among the jura rerum—rights considered in reference to their objects; they gave

rise to actions in rem, and they are excluded from the jus personarum, which was reserved for rights appropriated to some particular class of persons. Blackstone, however, changed this by adding to the word thing the further limitation, 'unconnected with the person.' All his other changes are mere consequences of this. It is evident that security, liberty, reputation, health, the body, limbs, life itself, are all so connected with the person that they cannot be treated as 'things' under this new definition. The right to the safe enjoyment of all these is still, as much as ever, a right against all persons whatsoever. It is a jus in rem, if you please, but it certainly is no longer a jus rerum. There is but one alternative, and that is to place these right where, under Blackstone's definition, they properly belong—with the other rights of persons." Hammond's Int. to Sandars' Justinian, lvi.

§ 77. **Remedies to protect and enforce are essential parts of the definition of right and obligation.** Before proceeding with the treatment of these words it will be wise to refer again to the meaning of right and obligation. A right was defined to be the capacity to do or have, or to compel others to do or refrain from doing.

Now, an obligation is the duty resting upon the party from whom some action is due, together with the vinculum jus, the binding tie of the law. The duty may be simply a moral obligation, but the obligation which the law enforces is something more tangible; it is the artificial or civil obligation.

The law does not, however, ignore moral duties for as we shall see in connection with contracts and trusts the moral obligation is an important factor.

The distinction between right and obligation, and the classification of rights herein pointed out, has a very material influence upon the classification of actions or remedies.

It should be observed that the protected right, and the enforced obligation, are the efficacious ones, and that the element of "capacity to enforce, with the aid of the law," is an essential element in the definition of a legal right. In other words, the remedy to enforce and protect is an essential part of a right, and the power to enforce is the obliging part of an obligation (1).

In Green v. Biddle, the supreme court of the United States declared: "Nothing, in short, can be more clear, upon the principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, or which clogs his recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions" (2).

In Bronson v. Kinzie, Chief Justice Taney quotes the

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1 Consult again the definition of law supra.

2 8 Wheat. 75.

language used in Green v. Biddle and adds: "And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it. Blackstone in his Commentaries on the Laws of England (vol. 1, p. 55), after having treated of the declaratory and directory parts of the law, defines the remedial in the following words: 'The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no methods of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law.' We have quoted the entire paragraph, because it shows in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right without any practical operation upon the business of life" (3).

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[3] 1 How. 317.

§ 78. **The classification by civilians of rights as real and personal.** We are obliged now to notice the same word "jus" in its other signification, meaning rights; and it may be said by way of encouragement to students that it is not to be expected that a clear comprehension will be obtained of this intricate subject at a single perusal. A matter of this nature requires study and thought.

Ortolan's Presentation of Real and Personal Rights (4).—Personal Rights; Real Rights (a Classification Not Adopted in the Roman Law) (5).—Right is any faculty that a person has to do, to omit, or to exact something.

Roman jurisprudence did not recognize any general division of rights. That which is now commonly received, however, though not belonging to, was derived from Roman law.

Rights are divided into personal and real rights.

We accept this division because it is exact, provided it is well defined.

Idea of personal and of real rights. Leaving for a moment Roman traditions, if we confine ourselves to pure reason, the following notions appear to be forced upon us:

No right exists except from one person to another; every right has therefore, necessarily, one active subject,

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[4] Ortolan's Hist. Rom. Law, 647, 648, 650, 651, 652, 653. In the case of extracts from Ortolan's writings no apology is necessary for indulging in copious quotations; but there are many cases where an author of an institutional treatise best serves his reader by exact quotation, rather than by garbled paraphrase. *The duty of the honest author is fair use and frank acknowledgment.*

[5] Nor are they adopted in English or American law.

and one or more passive subjects; which whether active or passive, can only be persons. In that respect all rights are therefore personal.

Every right, besides the active and passive subject, has moreover, and necessarily, an object, which, in its widest sense, is designated a thing. Every right has, therefore, a thing for its object; and, in that respect every right is real (6).

Therefore every right, without exception, is at once personal as to its active as well as passive subject, and real as to its object.

But the mode in which persons as subject, active or passive, or things as object, can appear and act in the right, assumes two very distinct phases.

The relation of right and obligation. Every right, if we go to principles, is summed up in the faculty which the active subject has to exact something from the passive subject. Now, the only thing which it is possible immediately to exact from a person is that that person should do or abstain from doing something; that is to say, action or inaction. It is to this that every right is reduced. This necessity for the passive subject to do or to abstain from doing something is what is called, in legal language, an obligation.

Every right, therefore, without exception, if we go to principles, consists in obligations (7).

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[6] These distinctions are important because they determine whether the vindication of the right shall be by an action in personam or an action in rem; hence the occasion for the care in explanation at this point.

[7] This word "obligation" had an importance in Roman jurisprudence far above the same word in English law. In the former it was

To sum up, a personal right is that in which a person is individually the passive subject of the right.

Or, in other terms, a personal right is that which gives the faculty of individually obliging another to do or to abstain from doing something.

A real right is that which gives the faculty of deriving advantage from a thing (8).

In both cases we may leave out of the question the community in general, bound to non-interference (9).

The definition thus given is wide. All rights, without any exception, in whatever manner they may be acquired, exercised or sued for at law, and whatever may be the corporeal or the incorpereal thing which is the object of them, come under one category or the other.

It is not an arbitrary definition, but one which necessarily emanates from the nature of things; it is subject to no change, and reproduces itself inevitably in every legislation. [He means every system of law designations.]

§ 79. **Various denominations of real rights and of personal rights.** Jus in re, the expression for real rights, and jus ad rem for personal rights, are barbarous expres-

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the foundation of every right in personam; in the latter the word was of technical import and meant a particular species of contract. By reason of the constitutional provision prohibiting any state from passing any law impairing the obligation of a contract, this word has attained an importance greater than it ever before had.

8 By exercising dominion over it. The word "thing" is here used in the very broadest sense. The obligation of a contract would be a "thing" in that sense.

9 Like all generalities, like many such indulged in by theoretical writers, this must not be taken too implicitly. The community is not always bound to non-interference. A striking example is Louisiana v. New Orleans, 109 U. S. 285.

sions introduced in the middle ages, which have never belonged to the language of Roman law. The former already appears in the Brachylogus, the summary of the law of Justinian compiled in Lombardy in the twelfth century. Both are to be met with in the thirteenth century, opposed to each other in the papal constitutions; and it is from the canon law that they seemed to have passed into secular jurisprudence. We must rid our judicial language of it (10).

Jus in rem and jus in personam not of Roman Origin. The expressions jus in rem for real rights, and jus in personam for personal rights, framed after the model of some analogous expressions of Roman law, do not, any more than the preceding, really belong to it.

Absolute and relative right (11). This is a philosophic division altogether foreign to Roman jurisprudence. It is certainly more rational than the last; but it is equally objectionable, because it seems to imply the idea that absolute right exists with regard to everybody, whilst the personal or relative right only exists with regard to persons, the passive subjects of this right. Every right, from the moment it exists, exists with respect to all, and must be protected, if needs be, against all. Only, in the case of real rights, no person whatever is individually the passive subject of them; whilst, in the case of personal rights, a person is individually the passive subject of them. . . .

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10 This is simply an impossibility. We must accept the language of the law and endeavor to master the meaning of it. These expressions are in our law to stay, although they mean now almost the opposite of their former meaning.

11 See next chapter.

But, in conclusion, we desire to point out that these expressions are both equally foreign to the law of the Romans, and that in this law no such general division was ever made nor had it any place in their system.

§ 80. Same subject: John Austin's presentation. "Jus reale sive jura realia" et "jus personale sive jura personalia:" In the language of modern civilians, and in the language of the various systems which are offsets from the Roman law, rights availing against persons universally or generally, and rights availing against persons certain or determinate, are not infrequently denoted by the distinctive name of "jus reale" and "jus personale;" the adjective reale being substituted for "in rem," and the adjective personale for "in personam."

These expressions are so ambiguous that the following cautions may be useful to the student:

1. "Jus reale" and "jus personale," which signifies rights in rem and rights in personam, must not be confounded with "jus rerum" and "jus personarum;" i. e., "law of things" and "law of persons."

2. The distinction of the civilians between real and personal rights must not be confounded with the distinction of the English lawyers between real property or interests and personal property or interests. Real rights (in the sense of the English lawyers) comprise rights which are personal as well as rights which are real (in the sense of the civilians); and personal rights (in the sense of the former) embrace rights which are real as well as rights which are personal (in the sense of the latter)

The distinction is an essential one. The difference between real and personal (as the terms are understood by the civilians) is essential and necessary. It runs through the English law just as it pervades the Roman, although it is obscured in the English by that crowd of gratuitous distinctions which darken and disgrace the system. But the difference between real and personal (in the sense of the English lawyers) is accidental (12). In the Roman law there is not the faintest trace of it.

3. In the sense of the civilians, "jus personale" signifies any right which avails against a person certain or against persons certain. In the English law "personal" sometimes signifies a sort or species of such rights, viz.: those rights of action which, in the language of the Roman lawyers, "nec heredibus nec in heredes competunt," which neither pass to the persons who represent the injured parties, nor avail against the persons who represent the injuring parties. Being limited to partis who are directly affected by wrong, and only availing against parties who are authors of wrong, these rights of action are styled by English lawyers personal, or (more properly) they are said to expire (or to be extinguished) with the persons of the injured or injuring.

"Actio personalis moritur cum persona" (13) is a

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12 Personal, personalis, le, adj. It hath in our common law one strange signification, being joined with the substantive, things, goods or chattels, as things personal, goods personal, chattels personal; for thus it signifieth any corporeal and movable thing belonging to any man, be it quick or dead. Old Law-French Dic., by F. O., 1701. That is to say, land is no more real than a horse; it is no more property than is a chattel; in fact, not so much in the English law.

13 Bro. Max., 904.

rule or maxim applied to the rights in question. But, like a thousand phrases dignified with the name of maxims, this wretched saw is a purely identical proposition. For a personal action (as the term is here understood) means a right of action which expires or is extinguished with the party (14).

The simple meaning is that the right is so identified with the person that it cannot exist without or separated from him, and hence it cannot be transferred by descent or purchase (15).

§ 81. The application of these distinctions in our law. In the preceding chapter great pains was taken to explain the meaning of Blackstone's divisions of rights, as those which concern and are annexed to the persons of men, and such as men may acquire under external things unconnected with his person, and we have just shown that these conceptions are peculiar to English jurisprudence.

Attention was called to the fact that an intangible thing might still be the object of a right, and such, as we pointed out, was the case of the word chose. We shall see other intangible rights besides choses.

To the English lawyers all classes of rights were either political rights, as magistrate and people, or fell within the compass of domestic relations, or they were rights to real property, personal security, or private property. These latter Blackstone classes under the head of absolute rights.

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14 2 Austin's Jur. pp. 1011-13.

15 This subject will arise in later parts of this work. See Assignability.

This classification and the designation of certain rights as absolute has had such an intimate association and so wide an influence in American law that it is imperative that we examine and accept or reject it before the subject of rights and obligations in American law can be properly understood and expressed. But, before we proceed with this examination, attention may be directed to a distinction between different classes of rights so obvious and natural that even the beginner may easily grasp it, by applying his reason to his every-day observation.

The subject of property, ownership and dominion is so apparent and prevalent as to obtrude itself upon the view of every one. In daily life we see the exercise of dominion over land, the control of tangible chattels, and the display of ownership of intangible choses, such as stocks, bonds, warehouse receipts, and the enforcement of promises made by one man to another, or agreements made by one man with another.

Ownership or dominion over things (i. e., property) differs in its nature from the contracts or agreements we have spoken of.

The distinction between the two is in the nature of the obligation incumbent upon third persons in reference thereto. Right of ownership or property is in and to a definite, determinate thing, tangible or intangible.

The obligation of third persons as to one's property applies equally to all persons.

In the case of contracts or agreements, the obligation rests primarily upon a certain determinate person or aggregation of persons.

Rights against a certain determinate person may arise independent of contract, viz.: by unlawful conduct towards or treatment of one person by another. These are called delicts by the Roman jurists, and torts by the Norman-French jurists, and consequently we have in the English law the actions ex delicto, based upon conduct passing under the generic term tort. These transactions which give rise to contracts or agreements as well as conduct which gives rise to an obligation to respond in damages are all between certain determinate persons.

Anomalous obligations. There are obligations which arise from a combination of transaction and action or conduct and partake somewhat of the nature of both tort and contract but not solely of either; for example, the breach of a contract may be accompanied with such conduct as to partake of the nature of a tort, or a tort may occur under such circumstances and in relation to the property of another as to enable the person injured to select what deduction he shall draw from the whole circumstance. The wrong connected with a contract or some fiduciary relation is quasi ex contractu and quasi ex delicto (16). This results from the co-operation of act,

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16 "There are kindred principles in equity jurisprudence, whence indeed these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner, the cestui que trust has the option to take the original or substituted property; and if either has passed into the hands of a bona fide purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of the cestui que trust. The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the cestui que trust, and equity will so mould and apply the remedy as to give them to him." May v. Le Claire, 11 Wall. 236; Bro. Max., 279.

conduct and law, and a character is affixed by the use of what are called fictions; and it is sometimes said that the law, by the use of fictions, creates rights and imposes obligations. The idea of creation seems less applicable to the process than the term usually employed, that the law "implies" the contract, because the latter term allows the implication to arise from the acts or conduct of the party (17).

Other obligations arise without any immediate act, contract or conduct, merely from the fact of the existence of persons in relation to each other.

These give rise to rights of one person over or against some other definite person and also against all the world; e. g., the husband and wife by the marriage acquire such rights. So do parent and child. Again, by the death of one or the other, rights and obligations, new in their nature, arise, all independent of either contract or tort (ex mero jure) by mere force of law. These may be property rights by inheritance, or a right of an anomalous nature, e. g., the right of support and protection (18), or it may be a mere personal right, or, as Hale terms it, the interest one has in his own person, the obligation to respect which rests upon all persons alike, and upon no definite

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17 Central Bridge Corp. v. Abbott, 4 Cush. 473.

18 "The right of the wife to support during marriage is not an interest, strictly speaking, in the property of her husband. It is a benefit arising out of the marital relation by implication of law. Treating the provision which the law makes for the widow and the children residing with her, by the allowance of specific articles of property, as a means of support, it cannot be said to be an interest in the property itself of the husband. It comes within no definition of property. It is a benefit created in their favor by positive law, and adopted for reasons deemed wise and politic." Phelps v. Phelps, 72 Ill. 547.

specific person. In such a case the public or the law (formerly the sovereign) assumes the position of authority, and acts in the matter as a parent or one having a superior position would act, if in existence or acting as parens patriae, the father of the whole country (19).

The criterion, the obligation attendant upon all of these rights is distinguishable, on account of the orbit of persons upon whom it rests, into two classes. The first, some particular person or set of persons; the second, the community at large, and no more upon one than upon all.

The real rights—first spoken of obtain against all.

The personal right against particular persons.

The jus in rem corresponds to the first; the jus in personam to the second.

This classification has no reference to that concerning which the right exists, that is to say, the object of the right, whether it be land or contract, tangible or intangible.

Resume. The phrase in rem denotes the compass and not the subject of the right. It denotes that the right in question avails against persons generally; and not that the right in question is a right over a thing. For, as I shall show hereafter, many of the rights which are jura or rights in rem are either rights over or to persons or have no subject (person or thing). The phrase in per-

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[19] Aymar v. Roff, 3 John, Ch. 49. "We also understand that, in theory of law, the state, in its character of parens patriæ, may rightfully exercise the same power and control over the persons and property of lunatics and idiots that was exercised by the Crown of England through the Lord Chancellor at the period referred to." Dodge v. Cole, 97 Ill. 354.

sonam is an elliptical or abridged expression for 'in personam certam sive determinatam.' Like the phrase in rem it denotes that the right avails exclusively against a determinate person or against determinate persons.

Ownership or property. "Ownership or property is, therefore, a species of jus in rem. For ownership is a right residing in a person over or to a person or thing, and availing against other persons universally or generally. It is a right implying and exclusively resting upon obligations which are at once universal and negative. Where the subject of a right in rem happens to be a person, the position of the party who is invested with the right wears a double aspect. He has a right (or rights) over or to the subject as against other persons generally. He has also rights (in personam) against the subject, or lies under obligations (in the sense of the Roman lawyers) towards the subject."

Contracts belong to rights in personam. "All rights arising from contracts belong to this last-mentioned class, although there are certain cases (to which I shall presently avert) wherein the right of ownership, and others of the same kind, are said (by a solecism) to arise from contracts, or are even talked of (with flagrant absurdity) as if they arose from obligations (in the sense of the Roman lawyers)" (20).

It is now sufficiently plain that the classification of rights as real and personal, or ad rem and ad in personam certum, was not made the basis of any division of subjects in legal classification although it points out a

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[20] 1 Austin's Jur. 379, 380-3-4.

natural distinction between classes of rights. It is also clear that it does not obtain as a basis of classification in English or American law.

§ 82. **Right and obligation correlative; a right is a possession; an obligation is a burden.** In the Roman law obligation was a generic word embracing in its scope several species, distinguished from each other by the manner in which they arose. The first class arose out of transactions between persons, which gave rise to contracts express or implied. The second class arose from conduct inimical to the rights of another, and gave rise to what we term wrongs or torts.

In the English law, obligation was degraded from its position as a great generic term to the position of the designation of a single class of agreements under seal (21).

In the United States the word has again acquired vast importance by reason of its introduction into the constitution, whereby the states are prohibited from passing any law impairing the obligation of a contract.

The peculiarity of the phrase obligation of a contract seems to imply that the obligation is something distinct from the stipulation, agreement or contract, and con-

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21 Ingraham v. Edwards, 64 Ill. 526. The narrow meaning of the word in the common law is for the present sufficiently pointed out by the following definition: "*An obligation*, obligato, onis, f. Obligation is a word of its own nature, of large extent, but it is commonly taken in the common law for a bond containing a penalty, with condition for payment of money, or to do or suffer any act or thing, and a bill is most commonly taken for a single bond without condition. Coke on Lit., lib. 3, cap. 1, sec. 259." From an Old Dictionary by F. O. [1701].

tinues after the contract is executed (22). This subject will be treated in the proper place, but it may be excusable to here observe that the constitution does not mention obligations arising ex delicto.

Illustration and application. In Ogden v. Saunders (23), Mr. Justice Johnson says: "Right and obligation are considered by all ethical writers as correlative terms; whatever I, by contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligations of every contract will then consist of that right or power over my will or actions which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative and not a positive (24) interpretation; for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these

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[22] See Fletcher v. Peck, 6 Cranch, 87; Ogden v. Saunders, 12 Wheat. 213-217.

[23] 12 Wheat. 281

[24] i. e., absolute.

rights, because in a state of nature they are asserted over a fellow creature, but in a state of society over a fellow citizen. Yet, it is worthy of observation how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society in their application to the class of contracts under consideration."

Use made of the distinction. As pointed out above, English jurists set aside and disregarded entirely the above distinction so far as it related to the classification of rights, but it is retained and made the basis of one of the most important distinctions between actions to enforce rights.

Actions in rem and actions in personam depend for their distinguishing features upon the identical principles above pointed out, and involve respectively rights in rem and rights in personam.

These matters will be considered in their appropriate places, but the student may the better understand this matter by examining the cases cited below (25).

In place of this classification we find, in Blackstone's classification, a separation differing entirely in its expression and taking a double form, viz.: First, the right of persons and the right of things, which has been examined. Second, the right of persons is by him classified as absolute and relative. This latter classification will next require our attention.

§ 83. **Absolute and relative rights.** There is another designation of the nature of rights of individuals which

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[25] Grigg v. Arnett, 134 U. S. 316; Woodruff v. Taylor, 20 Vt. 63; Cooper v. Reynolds, 10 Wall. 308.

has come to us from England and exists as a sort of tradition of the legal profession, and which constitutes a stumbling block in the way of a proper understanding of the law of private rights or the nature of constitutional law. This is the so-called absolute right, which forms such a prominent feature of Blackstone's treatment.

He very properly distinguishes between natural persons and artificial persons and corporations. The rights of natural persons he classifies as absolute rights and relative rights. He includes under and as a part of the absolute rights of individuals, personal security, personal liberty, and the right of private property, without any hint that a portion of these rights belong as well to corporations as to individuals; for example, the inviolability of contracts, and protection against unreasonable seizure and searches.

For this reason alone the classification of rights into absolute and relative, as applied by him, is defective.

There is, however, a more powerful reason for discarding the whole notion of absolute rights. The first book of the Commentaries treats of all of those reciprocal rights, duties, preogatives and jurisdictions which make up the sum of governmental relations, including the entire attributes of sovereignty, legislative, executive, judicial, and also the rights of individuals, a portion of which are there designated absolute rights, another class of which are called relative rights or domestic relations, and finally in the same book the subject of corporations is treated.

Absolute rights are there explained to be such as pertain or belong to particular men as individuals or single

persons, and such as would belong to them merely in a state of nature.

Relative rights—those which are incident to them as members of society and standing in various relations to each other (26).

Hammond says this division into absolute and relative rights depends on a theory common to all writers of his time, English and Continental (27). This was the obsolete theory of natural rights, and he says the definition may be set aside with the obsolete theory to which it belongs (28).

§ 84. All rights are relative, not absolute. This division into absolute and relative rights we shall show is neither a natural division, nor yet is it one which accords with reason or the facts. There is no such thing as natural rights or absolute rights existing within organized society; all rights within the body politic are relative and subject to the law of the land (29). What one has a right to is his; and to call it absolute does not make it any more his own. What Blackstone probably meant was that these were rights inviolate, even against the government (30).

James Wilson, afterwards justice of the supreme court of the United States, in his address in vindication of the colonies, says: "Liberty [the equivalent of absolute right] is by the constitution (of England) of equal sta-

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[26] 1 Blk. Com. 123.

[27] Int. to Sandars' Justinian, Hammond's ed., p. lii.

[28] Id., p. liv.

[29] Calder v. Bull, 3 Dall. 386; People v. Town of Salem, 20 Mich. 452; 4 Am. Rep. 400-10.

[30] People v. Town of Salem, 20 Mich. 452; 4 Am. Rep. 410, 411.

bility, of equal antiquity, and of equal authority, with prerogative. Those duties of the king and those duties of the subject are plainly reciprocal; they can be violated on neither side unless they be performed on the other. The law is the common standard, by which the excesses of prerogative, as well as the excesses of liberty, are to be regulated and reformed."

ILLUSTRATION.

"Every man has an abstract right to the exclusive use of his own property, for his own enjoyment, in such a manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the center of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property, in his own way, is compelled to yield to the general comfort and protection of the community, and to a proper regard for the relative rights of others. The situation of his property may even be such that he is compelled to dispose of it, because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood; and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher, in the vicinity

of whose premises a village has grown up, finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has became inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood."

Blackstone's treatment does not justify the designation. Blackstone's comment upon the subject does not warrant or justify the division. He says (Book I, page 125): "Every man when he enters into society gives up a part of his natural liberty. The absolute rights of man are usually summed up in one general appellation, and denominated the natural liberty of mankind."

Again, "political or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws as it is necessary and expedient for the public good." This definition is taken bodily from the Institutes (31).

Again he says: "The absolute rights of every Englishman, which (taken in a political and extensive sense) are usually called their liberties," etc (32).

These are explained to be such as depend upon the fundamental articles of their government, viz.: the Great Charter, the statute called the "Confirmatio cartarum,"

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[31] Institutes, 1-3-1.

[32] 1 Blk. Com. 127.

the petition of rights, habeas corpus act, bill of rights, acts of settlement, etc.

He then proceeds: "Thus much for the declaration of our rights and liberties. The rights themselves thus defined by these several statutes consist in a number of private immunities, which will appear from what was promised to be, indeed, no other than either that residuum of natural liberty which is not required by the laws of society to be sacrified to public convenience, or else those civil privileges which society has engaged to provide in lieu of the natural liberties so given up by individuals." These, he says, are the right of personal security, personal liberty, and the right of private property. Thus he says absolute rights are natural rights, and then says that these are given up (33).

These rights, he has asserted, are the first and primary end of human law (34). It needs no argument to prove that these are the rights referred to in the preamble of the Federal constitution as "the blessings of liberty," and more especially enumerated in the amendments proposed by the first congress (35). These rights were treated by Blackstone as standing alone, or rather opposed to the powers of government, i. e., absolute; and then follow chapters relating to the king and his dominion, parliament and its powers, the courts and their jurisdictions. In no sense is this in strict harmony with the facts. Their first palladium was the Great Charter, which was obtained by the barons from King John, and so on

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33 1 Cooley's Blk. 125, note.

34 1 Blk. Com. 125.

35 1 Sharswood's Blk. 125, note.

through the list of petitions, bills and acts that define and defend these rights, there is an appearance of an agreement with the sovereigns for the preservation of those rights which are (by him) called absolute, but are spoken of as franchises and immunities (36).

§ 85. **Lord Hale did not recognize absolute rights.** Lord Hale in his analysis puts these matters in a different manner. After outlining the main divisions in accordance with the Roman law, he speaks of natural persons thus: "Persons natural are considered in two ways: absolutely, and simply in themselves, or under some degree or respect of relation." As considered absolutely, he speaks of their interest and their capacities or abilities. Hale does not use the word status, but uses the English equivalents, and as status was always spoken of in connection with man or individual, so he treats capacities or abilities of natural persons considered absolutely in themselves, i. e., as individuals. The treatment of capacity he refers to the ability to take and hold rights. This makes the matter perfectly clear, and robs Blackstone of any excuse for the term "absolute rights."

Hale, in his analysis (sec. 2), the title of which is: "Of the relations of persons and the rights thereby arising," says: "Now, as to persons considered in respect of relation. The rights thereby arising are of three kinds, namely: Political, economical, civil." Then proceeding: "The political relation of persons, and the rights emergent thereupon, are the magistrate and the people or subject;" section 3, of the king's person; 4,

[36] See opinion of Jay, J., in Chisholm v. Georgia, 2 Dall. 470.

his prerogatives; 5, his domain and power; 6, his jurisdiction; 7, his royal revenue; 8, his temporal revenue; 9, his relative prerogatives; 10, of the subordinate magistrate; 11, temporal magistrates; 12, inferior magistrates. In section 13 he approaches again the rights of the people, which he says are rights of duty (?) to be performed; rights of privilege to be enjoyed; and continuing, he says, on page 28: "The rights and liberties to be enjoyed by the people, both in relation to the king and all his subordinate magistrates are: that they may be protected by them and treated according to the laws of the kingdom in relation to their lives, their liberties, their estates. And here falls in all the learning upon the statute of Magna Charta and Charta de Foresta, which concerns the liberty of the subject, especially Magna Charta (ch. 29) and those other statutes that relate to the imprisonment of the subject without due process of law, as the learning of habeas corpus and the law relative to taxation, the petition of rights, monopolies, martial law, and he asserts the subject is in a strict sense the correlative of the prince" (37).

§ 86. **Distinction between Hale's and Blackstone's treatment.** A great distinction between Hale and Blackstone is that Hale treats all of these matters pertaining to personal security, personal liberty and private property as being a part of the rules governing the relation of persons in society and the rights thereby arising (see sec. 2) (i. e., he does not recognize as to these matters any such division as absolute and relative rights),

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37 Accords with Ogden v. Saunders, ante, sec. 67.

classifying them where they very clearly belong, among the civil rights of men (38). He classes under political relations that of which Blackstone says: "Political, therefore, or civil liberty, which is that of a member of society, is none other than natural liberty, so far as restrained, etc.;" (39) or, "The absolute rights of every Englishman, which, taken in an extensive and political sense, are usually called their liberties" (40).

§ 87. **Rights are secured, not surrendered, by creating government.** Mr. Justice Wilson says: "In a state of natural liberty every one is allowed to act according to his own inclination, provided he transgress not those limits which are assigned to him by the law of nature; in a state of civil liberty he is allowed to act according to his own inclination, provided he transgress not those limits which are assigned to him by the municipal law. True it is that by the municipal law other things may be prohibited which are not prohibited by the law of nature; but equally true it is that under a government which is wise and good, every citizen will gain more liberty than he can lose by these prohibitions. He will gain more by the limitation of other men's freedom than he can lose by the diminution of his own. He will gain more by the enlarged and undisturbed exercise of his natural liberty in innumerable instances than he can lose by the restriction of it in a few. "Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government which is

[38] They are not rights in personam at all.
[39] 1 Blk. Com. p. 125.
[40] 1 Blk. Com. p. 127.

good and wise. And as it is with regard to his natural liberty, so it is with regard to his other natural rights" (41).

ILLUSTRATION.

Ogden v. Saunders.

"When men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it then to be true that, in general, men derive the right of private property and of contracting engagements from the principles of natural universal law; admitting that these rights are, in the general, not derived from or created by society, but are brought into it; and that no express, declaratory municipal law be necessary for their creation or recognition; yet it is equally true that these rights, and the obligations resulting from them, are subject to be regulated, modified, and sometimes absolutely restrained, by the positive enactions of municipal law. I think it incontestably true that the natural obligation of private contracts between individuals in society ceases, and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation. As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity to take or en-

[41] 2 Wilson's Works, 300.

force the delivery of the thing due to him by the contract, or its equivalent, so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to a contract and enforces its performance or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign state, must be precisely that allowed by the law of the state and none other. I say allowed, because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for and put in the place of natural obligation, would be co-extensive with it; but if by positive enactions the civil obligation is regulated and modified so that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the state declares the contract shall have no obligation it can have no obligation, whatever may be the principles of the natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations" (42).

The distinction between the position of Blackstone and other transatlantic writers, and that assumed by Wilson and the other American jurists, may be concisely put thus: By the former, civil liberty consists of natural liberty restrained by law; by the latter, society is considered as a natural state. Civil liberty is natural liberty secured by law. Government is by the latter held to be

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[42] 12 Wheat. 319-20.

but the means of enforcing the safeguards provided by the social compact which is called the constitution. The constitution does not create society, but is created thereby. It may create or change the government.

§ 88. **Resume of the statements.** The distinctions pointed out above will be made clearer by a comparison of Blackstone's analysis with the treatment of Lord Hale above given and the statements of the author.

Blackstone's analysis is as follows:

Chapter 4, Section I. The objects of the laws of England are: 1, Rights; 2, Wrongs.

Section II. Rights are the rights of persons, or the rights of things.

Section III. The rights of persons are such as concern and are annexed to the persons of men.

Section IV. Persons are divided by the law into natural persons, and artificial persons.

Section V. The rights of natural persons are: 1, absolute, or such as belong to individuals; 2, relative, or such as regard members of society.

Section VI. The absolute rights of individuals, regarded by the municipal laws, compose what is called political or civil liberty.

Section VII. Political or civil liberty is the natural liberty of mankind, so far restrained by human laws as is necessary for the good of society.

Section VIII. The absolute rights or civil liberties of Englishmen, as frequently declared in parliament, are principally three; the right of personal security, of personal liberty, and of private property.

§ 89. **Civil liberty and Blackstone's absolute rights the**

same. From the above it is clear that absolute rights are synonymous with political or civil liberty, and so treated under the seventh head or section, "Political liberty is natural liberty restrained by human laws." There is evident confusion between sections 7 and 8 and the statement implied in section 5. Section 5 affirms that only relative rights belong to members of society. Sections 7 and 8 are repugnant thereto. It seems perfectly clear that there is no such distinction between the various rights which are guaranteed and enforced by the law as that one part of them may be denominated absolute in any modern idea of the word, and another portion of them relative; and it is clear that the law, so far as it relates to persons and those rights which are annexed to the persons of men, irrespective of rights over external things or property, regards them as they stand in public relations or private relations.

Of this peculiarity of Blackstone's handling of the subject, Austin says: "Blackstone here runs into a singular confusion of ideas, for he opposes these natural or inborn rights, by the name of absolute rights, to what he calls the relative rights of persons. But there are no such things as absolute rights; all rights are relative; they suppose duties incumbent on other persons. He defines these absolute rights to be rights appertaining to them merely as individuals or single persons (43). . . . He further defines them as rights which would belong to persons in a state of nature, rights which they would be entitled to enjoy either in or out of society. . .As to legal rights, with which alone Blackstone was

[a] Had Blackstone stopped here, he would have avoided the error.

properly concerned, they, it is obvious, can only belong to a man in society. . . . Amongst others of these absurdities, Blackstone instances, as an absolute right, the right of private property—a right which, it is quite obvious, cannot exist out of a state of society" (44).

Mr. Austin, criticising Lord Hale, says: "The only gross mistakes that I have found in his masterly outline are his glaring and strange mistranslation of 'jus personarum et rerum,' and his placing under the department assigned to the status of persons, certain rights of persons which he styles their absolute rights" (45).

Lord Hale is not subject to the latter criticism, and his expression does does not furnish the ground, although undoubtedly it did contribute to Blackstone's error. Hale does say of persons that they are persons natural, or persons civil, i. e., bodies politic. "Persons natural are considered two ways: absolutely, and simply in themselves, or under some degree or respect of relation. In persons natural, simply and absolutely considered, we have these several considerations, namely: 1. The interest which every person has in himself. 2. Their capacities or abilities, etc;" but at the same time, in section 2 and section 13, he treats the rights and liberties to be enjoyed by the people in relation to their lives, their liberties, their estates—treating them there as relative rights. Another confirmation of this is that, when speaking of rights of things in section 23, he says here they (rights of things) are considered absolutely and

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[44] Austin's Jur., lect. 43.

[45] Austin's Jur. (3d ed.). 1869, p. 71.

simply themselves. Blackstone might as well have said absolute rights of things.

§ 90. **Possible explanation of Blackstone's meaning.** The peculiar notions at that time obtaining in reference to natural rights, together with the idea that we must not lose sight of, namely, the form of government being monarchical, the attribute of sovereignty inhering in the sense of a divine, or at least hereditary, right in the person of the king, and not remaining or being, as with us, in the people, may have seemed to Blackstone to require a treatment as distinct, independent, i. e., absolute, even against government, of those rights possessed by individuals in their particular persons and defined in such constitutional documents as we have mentioned. The idea was peculiar, and rested upon a seeming antagonism between the "people" and the government.

§ 91. **Law relates to personal relations, things, actions.** It seems obvious that in our scheme of government such enactments and regulations as are treated by Blackstone as protecting absolute rights of persons must be embraced within those rules governing the relations of the people, either in political affairs or in private conduct, as Hale classes them, or falling within the system that has grown up with us under the name of Constitutional Law.

Every rule of law creates or affects rights, so that every rule relates to a right. Every rule is addressed to a person, so that all law is the law of persons, and a thing can have no rights; nor can the law address things; so that, properly speaking, there are no such distinctions

as rights of persons and rights of things. But some rules relate to the relations of persons in society, having no reference to external, tangible, alienable things. Other rules relate to the dominion of persons over things, or, briefly expressed, to property (46). Still another set of rules relate to those things without which rights in law would be valueless, namely: the means of redressing or punishing injuries to them; which latter branch may be classed under the head of actions, which a learned writer on jurisprudence says "includes civil actions or legal demands of a right by an individual in which the end is compensation, and a state of prosecution in which the end is punishment" (47).

We have endeavored to disentangle the substance embraced within the body of the law from the obscurity which has enveloped it on account of forms of expression borrowed from another system, and, if we have succeeded, it is now plain to us, from a comparison of the Institutes of Gaius and Justinian, and the analyses of Hale and Blackstone, and the logical reason of things that the rules of municipal law may be classified as follows:

First. The rules which designate what are persons and regulate their relations in society, i. e., the law of persons or personal relations.

Second. The rules which regulate the nature of and manner of holding things, i. e., the law of property.

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[46] Wynehammer v. People, 13 N. Y. 378; Rigney v. Chicago, 102 Ill. 64.

[47] Heron on Jurisprudence, 67.

Third. The rules providing remedies, both public and private, i. e., actions; and this is the sense in which we say the law relates to persons, to things, and to actions.

Fourth. The law relating to matters prohibited under penalty and prosecuted by the state or nation, i. e., criminal law.

CHAPTER VII.

MAGISTRATE AND PEOPLE.

§ 92. **The public relations of men in society.** Sufficient has been said to indicate that our treatment is of subjects as they are affected by positive municipal law, excluding the laws of nature and divine law, except in so far as they receive recognition by the civil law. The point has now been reached where the different relations men may bear toward each other and toward society must be pointed out and the rights and duties which flow from such relations.

The idea of absolute power or absolute rights has been shown to be but a mere figure of speech, and the assertion has been ventured that Lord Hale's treatment gives no warrant for such a designation of rights.

While Blackstone occasionally speaks of absolute rights and absolute power, as though such might exist within a constitutional monarchy, wherever he treats these subjects he shows clearly that these figures of speech have no practical application.

Magistracy defined. Notwithstanding this tendency, no better definition of magistracy than that of Blackstone has been given, and it is to be regretted that it occurs in a part of the book remote from that where the authority of magistrates is treated. His statement is as follows:

"The true idea of government and magistracy will be found to consist in this that some few men are deputed by many others to preside over public affairs" (1).

It is only when these relations are established by law and the conduct of magistrates regulated by fixed and positive rules which even the most exalted magistrates must obey that a country can be said to have a constitution. It is in this sense that it is said the sovereignty of Russia or Turkey is considering the propriety of granting a constitution. In England the charters which constitute the written part of the constitution take the form of charters granted or confirmed by the sovereign.

Vattel says: "Laws are regulations established by public authority to be observed in society. The laws made directly with a view to the public welfare are political laws, and in this class are those that concern the body itself, and the being of society or form of government and the manner in which the authority is to be exerted; those in a word, which together form the constitution of the state are the governmental laws. The civil laws are those that regulate the rights and conduct of citizens among themselves" (2).

As a distinction between the character of laws classified

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1 1 Blk. Com. p. 307.

2 The idea to grasp is the distinction between political relations and private relations, and the consequent divisions of law. In accord. Heron says: "In time the relations between the Government and the people become subjected to certain *positive laws*. And the body of laws determining the relations between individuals and their government, is generally termed Constitutional Law or Political Law; the *latter term is preferable*." Heron on Jurisprudence, p. 70. Again he says: "The *Political Law* of a nation is the whole of the legal relations existing between the governors and governed."

according to their object this is immensely clearer than the more ancient division into public and private laws.

The reason for this change of thought and clearness of expression is found in the clearer conception of the fact that the regulation of the public relations could be by rules which were in the true sense law (3).

Neither Hale nor Blackstone recognizes any such division of law as public and private—their division being of the law governing men in political or public and in private relations.

The prominence given in American law to rights designated civil rights renders Hale's treatment peculiarly interesting.

Lord Hale says of the relation of persons and the rights thereby arising: "The rights thereby arising are of three kinds, viz.: Political, economical, and civil.

Hale's civil rights are not the same as civil rights under our system.

"Concerning Relations Civil. I have done with relations political and also economical, and therefore come now to those which I call civil. Though it is true that term, in a general acceptation, is also applicable to the two former relations. But in a limited and legal sense, I distinguish civil relations into four kinds, viz.: Ancestor and heir, lord and tenant, guardian and pupil, lord and villein."

Under the title economical Hale classes what we term domestic relations thus: "Of the rights of persons under relations economical; and first, of husband and wife."

[3] Id. p. 75.

"Thus far the rights of persons under a political relation; now concerning the rights of persons under a relation economical. And they are these: Husband and wife; parent and child; master and servant" (4).

In the United States these subjects are treated somewhat differently, all falling within the terms Political Relations, Domestic Relations and Civil Rights.

Illustrations of the manner in which jurists regard these matters. By political rights is meant the right, directly or indirectly, to participate in the government (5).

"A civil right under a government is a distinct thing from a political right in it. Thus, a state may deny to females the right to vote, but it cannot deny to them the right to sue in courts, or impose upon their property all the burdens of the community. To hold otherwise would lead to the affirmation of the right of the state to make race or color or religion or age or statute the criterion of civil rights, and to exert the absolute right of confiscation by classes or descriptions; for in such a case every person of that class or description would stand on an equality with his fellow-victims" (6).

In Luther v. Borden (7), Mr. Whipple, with whom was

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[4] Hale's Analysis, pp. 29-33.

[5] "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses." [Bouvier's Dic., tit. Rights, p. 485.]

[6] Santa Clara Co. v. So. Pac. Ry., 18 Fed. Rep. 429.

[7] 7 How. 1.

Mr. Webster, argued as follows: "There are three classes of rights; natural, such as those recognized in the Declaration of Independence; civil, such as the rights of property; and political rights. Society has nothing to do with natural rights except to protect them. Civil rights belong equally to all. Every one has the right to acquire property, and even in infants the laws of all governments preserve this. But political rights are matters of practical utility. A right to vote comes under this class. If it was a natural right, it would pertain to every human being, females and minors."

In harmony with this is the language of Justice Field in Ex parte Virginia (8): "In the consideration of questions growing out of these amendments much confusion has arisen from a failure to distinguish between civil and political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The thirteenth and fourteenth amend-

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8 100 U. S. 368. The distinction here sought to be made between political and civil rights is made still more clear in the so-called Insular Tariff Cases, especially in Downs v. Bidwell, 182 U. S. at pages 282-283.

ments are designed to secure the civil rights of all persons, of every race, color, and condition; but they left to the states to determine to whom the possession of the political powers was to be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly-made citizens of the states, as was done by inhibiting the denial to them of the suffrage on account of race, color and previous condition of servitude, a new amendment was required."

§ 93. **Magistrate and people. British and American view.** "The supreme magistrates," says Hale, "are legislative—the parliament (with whose rights I shall not here intermeddle) executive—the king."

Of the king he says: "Inasmuch as the king is by the law the head of the kingdom and people, the laws of the kingdom, eo intuitu, have lodged in him certain rights, the better to enable him to govern and protect his people" (9).

The next section is entitled, "Of such rights as relate to the king's person," "because they do belong to a king under this relation as king" (10) And under this head Hale treats the capacities of the king as being of two kinds—his political capacity, his natural capacity; thus, "As to his political capacity, he is a sole corporation of a more transcendent nature and constitution than other corporations; whereby he is discharged from any incapacities which, in the case of other persons, would obstruct his succession, as alienee, etc.; disable his actions, as infancy or coverture."

[9] Hale's Anal., sec. 2.
[10] Id.

It thereby appears that the king is a sole corporation; it is also made plain that he is a political corporation. The kingdom of Great Britain is in the same sense a corporation. Section four of the analysis concerns the prerogatives of the king, "and those prerogatives are of two kinds: direct and substantive prerogatives, incidental and relative prerogatives."

The direct and substantive prerogatives may be distributed under three branches, viz.: Jura majestatis, vel summi imperii, i. e., the right of dominion; potestas jurisdictionis, vel mixti imperii, i. e., the power of jurisdiction; census regalis, or the royal revenues.

Blackstone says: "The most universal public relation by which men are connected together is that of government, namely, as governors and governed, or, in other words, as magistrate and people. Of magistrates, some are supreme, in whom the sovereign power of the state resides. In England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of kings, lords and commons; the other executive, consisting of the king alone." He then asserts: "In the British parliament is vested the legislative power and, of course, the supreme and absolute authority" (11).

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11 Blk. Com. 147. "The power and jurisdiction of parliament," says Blackstone, quoting from Sir Edward Coke, "is so transcendent and absolute that it cannot be confined either for causes or persons. It hath sovereign and uncontrolled authority in making, affirming, enlarging, abrogating, repealing, reviving and expounding of laws." 1 Blk. Com. 160. The quotation from Coke, as pointed out by Judge Wilson, is not only not literal, but omits important qualifications. Coke added that parliament was sovereign for making laws and proceeding by bill, meaning that parliament was the supreme legislative authority. 1 Wilson's Works, 164. "Parliament," says Matthew Hale, "is the

The nature of legislative power in the United States will be examined in another connection, but it may be here observed that this expression by Blackstone will not do for the United States (12).

§ 94. **Classes of magistrates.** Blackstone divides magistracy into supreme and subordinate, following in this, Hale's analysis. "All subordinate magistracy is derived from the supreme, either immediately or mediately, either by express grant from him or by something that implies or supposes it in its original, viz.: custom or prescription" (13).

Blackstone says of magistrates: "Some, also, are supreme, in whom the sovereign power of the state resides; others are subordinates, deriving all their authority from the supreme magistrate and accountable to him for their conduct, and acting in an inferior, secondary sphere" (14). This comports logically with the facts as they ex-

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highest and greatest of courts." As Judge Cooley justly observes, "Parliament was not merely a law-making parliament, but could execute the law" (1 Cooley's Blk. 4th ed. 161, note); and, as pointed out by Blackstone and Coke, it was the supreme authority in expounding laws. Such attributes are judicial in their nature. Even in the United States there have been instances where the exercise of judicial power is held to have been retained by the legislature, and especially so much of equity as the legislature sees fit not to delegate. Instances to which allusion is made are perhaps peculiar to the Pennsylvania constitution as expounded by the supreme court of the United States; the other case arising in the action of the legislature of Connecticut, as shown in the case to which allusion has heretofore been made. Such cases illustrate the imperfect separation of the departments of government. See Livingston v. Moore, 7 Pet. 469; Calder v. Bull, 3 Dall. 386.

[12] Taylor v. Porter, 4 Hill, 140; 40 Am. Dec. 274; Regents v. Williams, 9 Gill & J. 365; 31 Am. Dec. 72.

[13] Hale's Anal., sec. 10.

[14] 1 Com. ch. 2.

isted at that time in England. One set of magistrates derived power from another.

§ 95. **Magistrates in the United States.** There is a radical difference between the nature of public officers and Blackstone's description of magistrates and people under the English constitution. Under our law, all officers derive their power from the people (15). It follows that the reason not existing for the distinction between supreme and subordinate magistrates, made by Hale and Blackstone, it is unnecessary to make such a division in this analysis.

National and state officers. Our magistrates, who are all included within the appellation "officers" (16), are however, naturally divisible into two great classes, on account of the sphere in which they perform their official

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15 See Marbury v. Madison, 1 Cranch, 137. As to the nature and several kinds of offices, see McCormick v. Pratt, 8 Utah, 298, 17 L. R. A. 243, and a valuable note in the last report.

16 "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for administration of public affairs. When a person is inducted into office, he thereby becomes empowered to exercise its powers and perform its duties, not for his but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it. The doctrine on this subject is thus stated in the case of Connor v. The Mayor of New York, 1 Seld. 285: 'Public offices in this state are not incorporeal hereditaments, nor have they the character or quality of grants. They are agencies. With few exceptions they are voluntarily taken and may at any time be resigned. They are created for the benefit of the public and not granted for the benefit of the incumbent. Their terms are fixed with a view to utility and convenience, and not for the purpose of granting emoluments during that period to the office-holder. * * * The prospective salary or other emoluments of a public office are not property of the officer, nor the property of the state. They are not property at all. They are like daily wages unearned and which may never be earned. The incumbent may die or resign, and his

duty, viz.: as they are federal officers or state officers. It would not, however, be proper to say that one class of officers were superior or supreme, and the others subordinates, because they are each and all merely official agents created by the will of the people, and, in the main, independent of each other, and within the sphere assigned them they are independent of all other officers (17).

A distinctive feature of the American system of government, is the idea of delegating the administration of certain subjects to one branch of magistracy and the administration of certain other subjects to another branch, but each, while dependent upon the same source for power, is constituted by that power, within the respective sphere of each, independent of the other. In this the people are truly the sovereigns, and it is vain to denominate certain aggregations of people as sovereign and independent states, who have irrevocably renounced a portion of the sovereignty (18).

The great and radical vice of the old confederacy was the principle of legislation for states or governments in their corporate or collective capacities, and as contradis-

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place be filled, and the wages be earned by another. The right to the compensation grows out of the rendition of services and not out of any contract between the government and the officer that the services shall be rendered by him.'" Donahue v. County of Will et al., 100 Ill. 94, 103.

[17] Charles River Bridge v. Warren Bridge, 11 Pet. 139; Tennessee v. Davis, 100 U. S. 263; United States v. Cruikshank et al., 92 U. S. 547; Ex parte Virginia, 100 U. S. 346.

[18] Ogden v. Saunders, 12 Wheat. 350; United States v. Booth, 21 How. 516; Dodge v. Woolsey 18 How. 331-347.

tinguished from the individuals of whom they consisted (19).

The radical change which was made by the adoption of the new constitution was that in the main all laws of the confederation were addressed to the states in their political capacity, not to the individual citizens as is now the case in the United States; the citizen of any state being addressed by the laws of both jurisdictions. This line of demarkation is not territorial, but with reference to certain objects of jurisdiction. The idea cannot be better stated than it is in the Federalist (20).

If we compare the British government with our own, keeping in view the above distinctions, we may plainly see that for the former government Blackstone's division of magistrates into supreme and subordinate accords with the principles of the English constitution, that people consolidated into one nation with the supreme legislative authority vested in parliament, the supreme executive authority in the person of the king; the others are subordinate magistrates deriving all their authority from the supreme magistrates, accountable to them for their conduct, acting in an inferior secondary sphere as subordinate magistrates, being classed sheriffs, coroners, justices of the peace, constables, surveyors of highways and overseers of the poor. It follows that in our government the state officers cannot be said to be in any manner inferior or subordinate to those of the general government, while the state magistrates, bearing the same names and

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[19] Federalist, No. 15.

[20] No. 39. See also Ogden v. Saunders, 12 Wheat. 350; Downs v. Bidwell, 182 U. S. 244.

having similar authority as the subordinate magistrates named by Blackstone, might be said to be subordinate state magistrates.

Our primary division of magistrates or officers will be therefore into federal and state (21).

There are certain officers who derive their position from appointment of other officers, to whom the terms inferior or subordinate might be applied, e. g., the cabinet of the president and similar state officers; but these are not of the class mentioned by Blackstone, and the mode of appointment does not always indicate the nature of the powers to be exercised.

Federal officers are divided, according to the department in which they act, into legislative, executive and judicial.

As to state officers it is not deemed advisable to observe the division made by Blackstone into supreme and subordinate magistrates, for the reason that it appears from the opening words of his chapter on subordinate magistrates that he might well have included other officers not so designated, and for the further reason that the plan of the division we shall adopt seems more simple and natural (22).

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21 See Mr. Justice Wilson's comparison of the constitution of the United States with that of Great Britain. 1 Wilson's Works, ch. XI.

22 *Under the English system many offices were property and classed as incorporeal hereditaments*, giving the individual incumbent a right to the office and its emoluments. A man was said to have an *estate* in them. Thompson v. Peo., 23 Went. 535. Certain offices or public duties annexed to the possession of real estate. 2 Cooley's Blk. (3d ed.), p. 36; Rex v. Knolly's, 1 Ld. Ray. 13. The American theory of government does not permit ownership of offices and they are not hereditaments. 3 Kent, *454.

In one class of state officers will be included all such officers as many be termed "general state officers," including in it legislative, executive and judicial officers of the state. Under the other head, "local officers," we will include county officers, township officers, and municipal officers, using this latter term in the more restricted sense with reference to municipal corporations.

§ 96. **Public persons.** In American law the word "person" embraces all the beings and entities, official, individual, bodies politic and corporate, capable of having, owning or exercising rights (23); and under this title will be discussed the capacities, rights, duties and privileges of the various persons, official and private, recognized by our law. A classification of persons familiar to any one who has had even a slight acquaintance with law is that into natural persons and artificial persons. This classification is not because of any difference in the nature or capacity to own or enjoy rights. This is the classification of Blackstone, and he treats parliament among natural persons, and also as a body politic. Inasmuch as the title "artificial persons" embraces not only private corporations, but all bodies politic, including the United States, the states, etc., by following this classification we violate the principle of classification adopted, and treat under artificial persons, persons moving in entirely different spheres of action (24).

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23 "Personable, personabilis, le adj. One who may maintain a plea in a court, qui habet personam standi in judicio." From Old Dictionary by F. O., 1701.

24 All corporations, strictly so-called, are created by the government or by the people. The nation and the states come into existence by original agreement or convention of the people.

Whereas, the private corporation, so far as concerns its ordinary rights and the sphere in which it moves, does not differ materially from a natural individual, the corporation simply has not so many kinds of rights. While, therefore, this natural classification is not disregarded, we will adopt, as a primary division of persons, a classification which contrasts them because of the essential differences between the modes in which they arise, and the differences between their legal attributes and capacity and the sphere in which they move. In that view, all persons recognized by the law of the United States may be arranged under two great classes—public persons and private persons (25). This classification enables us to use the next obvious and natural classification of public persons, namely magistrates and people. Under it may be brought into view, in that position and prominence due to the legal personage which in reality constitutes the body politic, the people, and its treatment is permitted from the American standpoint, which is entirely different from the nature of the same title-head as used in the English law.

If the student will but turn to the Commentaries of Blackstone, he will find under the head "People," that people is used as synonymous with subjects, and only noticed as individuals. They are not said to be a part of the body politic. Justice Wilson very correctly brings this out as follows: "The parliament formed the great body politic of England. What, then, or where, are the people? Nothing; nowhere. From legal con-

[25] Walker, Am. Law, p. 59.

templation they totally disappear. They are not so much as the baseless fabric of a vision. Am I not warranted in saying that, if this is a just description, a government so, and justly so, described, is a despotic government'' (26).

§ 97. **The people of the United States.** The people of the United States, in their aggregate capacity, constitute the great body politic, the nation, and are commonly spoken of as the sovereign people. The identity, capacity and obligations of the people may be examined under this classification.

The people of the United States appear in a double aspect—as the people of the nation and of the states. Private persons are likewise naturally classified as individuals and corporations, which corresponds identically with the natural and artificial persons of Blackstone.

The word ''magistrate'' is used in conformity with the prevailing idea in the United States, and in conformity with the meaning of the word ''person'' as heretofore explained, designating not, in strictness, the individual who holds the office, because we are not concerned with who he is, but with what is his legal or political capacity or personality (27).

Officers are state and federal. In the treatment of these subjects it will be observed that not only the meanings of the words ''people'' and ''magistrate'' are differ-

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26 Chisholm v. Georgia, 2 Dall. 462.

27 Mississippi v. Johnson, 4 Wall. 475, 501; Marbury v. Madison, 1 Cranch. 137.

ent from the ideas associated with the same words in the English law, but the position of the treatment and classification is transposed, for the reason that it is more natural and convenient that we address ourselves to the principal personage first, viz., the people (28), and next, to their agents or officers, after which, in the proper place, may be treated, in their order, private persons, artificial and natural, domestic relations, property and procedure or actions. The criminal law may conclude the subject of municipal law, after which the other branch of jurisprudence, international law, may be briefly treated.

In order to obtain a clear conception of the political relations of the various persons that compose the body politic, it is necessary that we obtain a distinct idea of the nature of the persons themselves.

§ 98. **Definition of terms.** The words society, people, nation, state, government, citizen and magistrate are all familiar words, and each is supposed to have, and in fact should have, a distinct and definite meaning. It would be beyond the scope of this work to enter into an extended discussion of the origin and nature of society prior to the time when it had progressed so far as to be properly denominated civil society. Those discussions will be found

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[28] The editor of the fourth edition of McCrary on Election says: "In the great case of Chisholm, Ex'r, v. The State of Georgia, decided in 1793, Justice Wilson, one of the chief architects of our system of government, said: 'The well-known address of Demosthenes, when he harangued and animated his assembled countrymen, was: "O men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object which the nation could present. "The people of the United States" are the first personages introduced. Who were those people? They were the citizens of the thirteen states.'" Sec. 15.

in the writings of a century ago, and were then great and practical questions, having for their object the determination of what was the true basis and origin of government, that is, whether the right of administration of laws or the right of kingship or the right of government was of divine origin, or whether all civil government was an invention of man and was based upon the consent of the governed, or, to put it otherwise, whether the government was superior to the man (29).

§ 99. **Society, natural and civil.** We have been told that there was an original and natural state of society antedating civil society by which we mean an association of individuals united by common consent for a common purpose, ordinarily for the protection of private rights (30); but it is apprehended that as near an approach to the state of natural society discoverable, or in fact worthy of investigation, is found in the condition of the Indian tribes which inhabited America at the time of its settlement by our ancestors, and who are presumably held together by the natural ties of a common ancestry.

Questions relating to title and to real property, and claims by or in behalf of Indian tribes or members thereof, or citizens of the Union living among the Indians, have elicited several careful and able discussions of the state of society among the Indians which may be noticed hereafter. A mere citation will here suffice (31).

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[29] Chisholm v. Georgia, 2 Dall. 463.

[30] Declaration of Independence.

[31] Johnson, Lessee, v. McIntosh, 8 Wheat. 543; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 512. Cherokee Nation v. S. K. Ry. Co., 135 U. S. 641.

§ 100. **The people.** Before treating the several public persons in detail it will be useful to consider here concisely all the various persons. By thus examining them in close connection and obtaining a slight prenotion of each, we may be able the more easily to perceive the distinguishing features of each. We will briefly outline what is meant by the people, state, government, and citizen (32).

The word "people" means a body of persons regarded collectively. "The people," using the term in its proper legal acceptation, means the whole mass of male and female citizens, and this mass or body constitutes the political unit (33).

But in the constitution the word "people" is often used where the whole unit is not intended, but individuals are meant; thus, in the Bill of Rights, in all provisions in reference to seizures and searches, jury trial, right to assemble, in fact, in all reference to personal liberty.

§ 101. **Government, magistrates, officers.** Government is that organization to which the exercise of political powers is intrusted. It is the political system created by the agreement of the people, evidenced by the constitution or fundamental law. Government is not sovereign. "The sovereignty of the government is an idea belonging to the other side of the Atlantic" (34). The departments of government simply exercise delegated powers

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[32] Downs v. Bidwell, 182 U. S. 244.

[33] McCrary on Election (4th ed.), § 13.

[34] Webster's Reply to Calhoun on the Foote Resolution.

as the agents of the people (35). The government manifests itself in various forms of magistracy. These magistrates are officers; they have no personal powers, dignities or preeminences—nothing but official. The government nor any branch of it has any political rights of its own; it simply represents others who have. The constitution makes a plain distinction between the people and the government (36). The citizens are private persons, either individuals or private corporations, although the latter have no political rights.

§ 102. **Double meaning of state.** A state, using the expression in its broadest political sense, as nation—as the community organized under a constitution and exercising its constitutional powers—includes all persons, citizens, the people and the magistrate (37). Thus we say citizens, meaning individuals which compose the state; the people of a state, meaning the body in whom the right of government inheres; the government, meaning those magistrates to whom is delegated the power to administer the law. The people collectively constitute a person —a body politic, possessing rights, affairs, duties and property; but you cannot say of the government—that is, the legislature of the state, the executive of the state, or the judiciary of the state, or of the three combined—that they constitute a person (38), although, as magistrates, each officer has legal personality. The greatest person

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35 Lane Co. v. Oregon, 7 Wall. 71-76; White v. Hart, 13 Wall. 650; 2 Sharswood's Blk. 47, note.

36 Texas v. White, 7 Wall. 700-721.

37 State v. Young, 29 Minn. 536; Jameson on Const. Con. 15.

38 State v. Young, 29 Minn. 536.

of the trinity is doubtless the people, for it is the body politic of the state. But the most important person is the individual. Thus we say government is made for man. The chief end and purpose of government is the protection of private rights (39). By naming one part less than that whole (40) you do not express the full meaning of the state, but altogether they constitute that glorious fabric of which philosophers delight to speak under the designation of a state (41).

"A state, however," says Chief Justice Chase, "in the ordinary sense of the constitution, is a political community of free citizens occupying a territory of definite bounds and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed." The picture cannot be exhibited in clearer light than by using the language used by him. "It is the union of such states under a common constitution which forms the distinct and greater political unit which the constitution designates as the United States, and makes of the people and states which compose it one people and one country." And it is in this sense in which he used the expression, "The constitution in all its provisions looks to an indestructible Union composed of indestructible states" (42).

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39 Wynehamer v. Peo. 13 N. Y.

40 Penhallow v. Doane, 3 Dall. 93.

41 Texas v. White, 3 Wall. 721; Penhallow v. Doane, 3 Dall. 93.

42 "All the rights of the states as independent nations were surrendered to the United States. The states are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of states in the United States. They can neither make war or peace without the consent

"The word 'state' has a meaning peculiar to the United States. It means a certain political society forming a constituent part of the Union. There can be no state unless it be entitled to a representation in the senate. It must have its separate executive, legislative and judicial powers" (43).

§ 103. Complexity of the state and national system. The ordinary citizen and the casual observer as he daily sees the peaceful working of our governmental system, developed by the experience and study of a century, has no occasion to notice the exceeding complexity of the system of laws under which we live. But in fact the American system of government is the most complex that the history of mankind presents (44).

"Our country exhibits the extraordinary spectacle of distinct, and in many respects independent, governments over the same territory and the same people" (45); but, to make the anomaly striking, those functions which are

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of the national government. Neither can they, except with like consent, 'enter into any agreement or compact with another state.' Art. 1, sec. 10. cl. 3." New Hampshire v. Louisiana, New York v. Louisiana, 108 U. S. 90.

[43] Hepburn et al. v. Ellzey, 2 Cranch, 445.

[44] Bryce, Am. Con., vol. 1, part 1, p. 14. Mr. Bryce observes: "The casual reader of American political intelligence in European newspapers is not struck by this phenomenon, because state politics and state affairs generally are seldom noticed in Europe. Even the traveler who visits America does not realize its importance, because the things that meet his eye are superficially similar all over the continent, and that which Europeans call the machinery of government is in America conspicuous chiefly by its absence. But a due comprehension of this double organization is the first and indispensable step to the comprehension of American institutions; as the elaborate devices whereby the two systems of government are kept from clashing are the most curious subjects of study which those institutions present.

[45] Ogden v. Saunders, 12 Wheat. 350.

declared or commonly called the government are not sovereign. The people have not delegated the sovereignty itself to any one; they have rather destroyed the old idea of sovereignty. The constitution, together with treaties made under it and laws passed in conformity with it, are the supreme law of the land, and, as the words imply, there is no higher power (46). Certain officers are elected with authority over certain subjects throughout the whole domain of the nation. For other purposes, territorial limits exist, the people of which constitute a body politic, and this person (the state) exercises its power through officers appointed with power to do everything not delegated to federal officers or not reserved to the people.

The chief difference between the power of the United States and the state consists not in the manner of their creation or operation, but in the objects of control or jurisdiction for each exercises only delegated power; in the former the objects of government are enumerated, in the states these objects extend to everything not expressly or impliedly limited by the limitations of the state constitution and what has been granted to the national government. Both exercise delegated powers as agents of the people (47). This, with the constitutional adjustment of the judicial power, independent of, separate from and co-ordinate with the legislative and executive departments, and clothed with the authority to declare void and

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[46] State v. Peel Splint Coal Co., 36 W. Va. 802; 17 L. R. A. 387; White v. Hart, 13 Wall. 650.

[47] McCullough v. Maryland, 4 Wheat. 410; Chisholm v. Georgia. 2 Dall. 419

of noneffect all acts of legislation, from whatever source emanating, which contravene the provisions of the federal or the state constitutions, present the unique and striking features of the American constitution (48), the adoption of which, was in its day, regarded a prodigy.

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48 State v. Peel Splint Coal Co., 36 W. Va. 802; 17 L. R. A. 387.

CHAPTER VIII.

THE PEOPLE.

§ 104. **The people: Identity.** In the United States the people are brought on the stage as an acting political entity, acting, it is true, always through representatives. As expressed by Wilson, one of the signers of the Declaration of Independence: "In free states the people form an artificial person or body politic, the highest and noblest that can be known" (1).

By "the people" of a state is meant all of the members which compose that state and are integral parts of it, together making a body politic (2).

"The people as a corporate unit form an artificial person or body politic; thus constituted they form a moral person" (3). "It is this person we call a state" (4). "There is no distinction between the people and the state" (5).

It must not be forgotten that, in using the expression "the people," there is a distinction between the population of the nation, as individuals, and the same popula-

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[1] 2 Wilson's Works, 6.

[2] Penhallow v. Doane, 3 Dall. 55, 93; Wells v. Bain, 75 Pa. St. 39; Scott (Dred) v. Sanford, 19 How. 393.

[3] Keith v. Clark, 97 U. S. 460; 2 Wilson's Works, 321.

[4] 1 Wilson's Works, 321-25; 2 Wilson's Works, 6.

[5] Penhallow v. Doane, 3 Dall. 93.

tion organized under a constitution. By "the people," in this connection, we intend a body politic, a corporate unity. Because of the quality of singleness we may properly use the pronoun "it," though, this is not usual. It is hard for the citizen to lose sight of the individuals in the body; but correctly viewed, as drops of water lose their forms as drops when they mingle with the whole and become not drops, but one body, even so the citizen in his political capacity loses the civil capacity of an individual when viewed as a part of that great unit "the people."

It is the whole mass, and not a majority of the individuals composing it, which constitutes the people, and the people are to be regarded, not as an unorganized mob, but as a corporate unity composing a society (6). There

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[6] Jameson, Const. Con. (4th ed.), pp. 18, 19, notes: Von Holst's Con. Law, 48, 49; Penhallow v. Doane, 3 Dall. 92.

"A distinction was taken at the bar between *a state* and *the people of the state.* It is a distinction I am not capable of comprehending. By a *state* forming a republic (speaking of it as a *moral person*), I do not mean the legislature of the state, the executive of the state, or the judiciary, but *all the citizens who compose the state, and are, if I may so express myself, integral parts of it; all together forming a body politic.* The great distinction between monarchies and republics (at least our republic) in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation as a subject to him, though in some countries with many important special limitations. This, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens as such, are equal, and no citizen can rightfully exercise any authority over another but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community, which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their political capacity only. Thus A., B., C. and D. are citizens of *Pennsylvania*, and as such, *together with all the citizens of Pennsylvania*, share in the

are dicta to the effect that the people, when spoken of in the political sense, means only those persons having the right to vote, that is, the electors; and it is at the same time said that in the electors is vested the sovereignty (7). Thus stated, the idea does not, as we shall see, properly obtain, and is contrary to the principles of American institutions (8). Voters are but parts of the machinery of government (9). In the constitution "the people" is sometimes used to indicate persons or individuals. So in all provisions in reference to unreasonable seizures and searches. In such provision it is identical with the use in Blackstone.

§ 105. **Capacity. Power. Sovereignty.** We may now examine the powers of the people, and in the course of this examination but little time need be spent upon theory or metaphysical discussion of what ought to be the law governing the matter, but will, as far as possible, be confined to the practical, visible facts.

The discussion of the capacities of that person we term "the people" necessarily involves the discussion of what is termed sovereignty. Let no one suppose that this question is an impracticable one and that it has no further

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sovereignty of the state. Suppose a state to consist exactly of the number of 100,000 citizens, and it were practicable for them all to assemble at one time and in one place, and that 99,999 did actually assemble. The state would not be in fact assembled. Why? Because the state in fact is composed of *all* the citizens, not of *a part* only, however large the part may be, and one is wanting." Penhallow v. Doane, 3 Dall. 93.

[7] Cooley's Const. Lim. 40, citing Blair v. Ridgely, 41 Mo. 63; 97 Am. Dec. 248.

[8] 2 Wilson's Works, App'x A, p. 566; McCrary on Elections (4th ed.), sec. 13.

[9] State v. Cunningham, 81 Wis. 498.

value than the theoretical or metaphysical, or a display of mental acrobatics or ingenuity; for it will be seen that the question is one which lately, on several important occasions, has been the only discussion indulged in for the determination of great cases in court, and is liable to arise as a practical question at any time.

The discussion of the "sovereignty of the people," a term so often used, and we might say so much abused, involves the very foundation principle of this government.

There are two methods of discussing sovereignty: one the theoretical, star-gazing, phantom-chasing quests; another the practical, which consists in nothing more or less than determining what acts the alleged sovereign can legally perform. Thus Hale and Blackstone show us what the king and parliament had the legal right to do in the time of each, respectively, and by the changes in legal power the sovereignty is seen to change from the king, in the time of the former, to parliament in the day of the latter (10). The course of the inquiry will be to determine, first, the nature of sovereignty; second, its existence in our jurisprudence.

§ 106. **Early idea of sovereignty in English law.** The question must be examined in the light of our own constitutional history, and the references made to English history are for the purpose of illustrating precisely the changes made by our ancestors, who established our present constitution.

To fully appreciate the idea of sovereignty and the

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10 Const. Hist. Am. Law. 32.

changes which have taken place in the meaning of the word since its introduction in England upon feudal principles, we should go back so far at least as the time of Lord Bacon and Lord Hale (11).

The brief summary given in the note discloses that the parliament was originally treated as occupying a subordinate capacity as an advisory council of the king, while the jura summi imperii, which Blackstone calls the right of sovereignty, is not treated as residing anywhere else but as an attribute of the king's person—he has the jura majestatis, vel summi imperii, or the right of dominion, and the potestas jurisdictionis, vel mixti imperii, that is,

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11 *Section Three* of Hale's Analysis is entitled "Of such rights as relate to the king's person." Under this he speaks of the king thus: "Then, as to his *natural* capacity, as he is king; the great concerns of government requiring a great assistance to the king's natural capacity, the laws and customs of the kingdoms have furnished him with divers *assisting* councils, which are of two kinds, viz. (to abbreviate): ordinary and extraordinary councils. The ordinary council consists of privy council, council at law (the lord chancellor, etc.). This court had jurisdiction of appeals from the colonies. [See The Sarah, 8 Wheat. 396, note; Penn v. Lord Baltimore, 1 Ves. 444.] His extraordinary councils are two—secular and ecclesiastical. The secular councils are the house of peers and house of commons."

"*Section Four*, concerning the prerogatives of the king. Having shown you what rights belong to the king's person (the parliament being the council of the king), we come now to those rights which concern his prerogatives, namely: Jura majestatis, vel summi imperii, that is, the right of dominion; potestas jurisdictionis vel mixti imperii, that is, the power of jurisdiction.

Section Five, concerning the Jura summa majestatis, or rights of the king's empire or dominion.

"*Section Six* of the potestas jurisdictionis, or the king's right or power of jurisdiction. Hitherto of the jura summi imperii, or rights of empire or dominion; now we come to the pura mixti imperi or potestas jurisdictionis, wherein the king generally acts by his delegates, officers or representatives." Hale's Analysis.

the power of jurisdiction (12). The central idea is that, while the king has this sovereign power over his subjects, there is no legal power to control him; he was natural ruler, and all charters of liberty take the form of grants from the crown, confirmed by parliament. "When a government," says Judge Cooley, "grants a constitution, it remains supreme over it" (13).

§ 107. The divided sovereignty of Blackstone's time. Between the time of Hale and Blackstone great changes took place. The convention parliament denied that the king was the natural lord, destroying forever the doctrine of divine right. Therefore Blackstone says, "the law ascribed to the king certain attributes of a great and transcendent nature, by which the people are led to consider him in the light of a superior being, and pay him that awful respect which may enable him, with greater ease, to carry on the business of government." "This," he says, "is what I understand to be the royal dignity, the several branches of which we will now proceed to examine." First, the law ascribed to the king the attribute of sovereignty or pre-eminence (14), and all subjects owed to him allegiance, which was a personal feudal tie. Thus, a single personal sovereignty is retained, but the jura summi imperii, or the supreme power, is transferred from the king to the parliament, whereby parliament is raised up as the supreme power (15) of the kingdom (16),

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[12] See also 1 Blk. Com. 237.
[13] Con. Hist. Am. Law, p. 31.
[14] 1 Cooley's Blk. 241.
[15] Con. Hist. Am. Law, 33.
[16] 1 Cooley's Blk. 153.

whereof the king was a constituent part, and this unit, parliament being a body corporate, is invested with supreme, irresistible, absolute, uncontrolled authority (17). "For to set bounds is to distrust and destroy, and the law being incapable of distrusting those whom it has invested with any part of the supreme power, since such distrust would render the exercise of that power precarious and impracticable, for wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it, the very notion of which destroys the idea of sovereignty" (18).

Thus we see the modern English sovereignty in an omnipotent parliament without any judge upon earth to define its powers, which are without limit, because, (19) it is said, to set limits against the abuse of power destroys the idea of sovereignty (20).

In that day the limitations upon the king's prerogative were certain and numerous (21).

The privileges and powers of parliament were uncertain and indefinite as well as unlimited (22).

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17 Id. 49. See Cooley's notes.

18 1 Cooley's Blk. 244.

19 1 Blk. 48.

20 Id. 244.

21 Id. 141, 233, 237; Miller on Constitution, 67, note.

22 1 Blk. 163-64. This view of Blackstone was not generally accepted by the English people. The following view of Junius is nearer to a just conception: "The power of king, lords and commons is not an arbitrary power; they are the trustees, and not the owners, of the estate. The fee simple is in us; they cannot alienate; they cannot waste. When we say that the legislature is supreme, we mean that it is the highest power known to the constitution; that it is the highest, in comparison with the other subordinate powers, established by the laws. In this sense the word 'supreme' is relative, not absolute. The power of the legislature is limited, not only by the general rules

§ 108. **Effect of declaring equality.** From the premises furnished by this statement from Blackstone's treatment of English law, we may now ask the question--

When inequalities of rank are destroyed, and plainly defined bounds are set upon the power of legislation, and an independent tribunal created which has jurisdiction at the instance of an individual (23) to annul an act of the legislative body and to keep all power within the defined limits, is not sovereignty destroyed?

It will be admitted by all that sovereignty is not recognized in American law in the same sense in which it was said to exist under the English constitution, for it there existed as a right, a substantial right, an absolute right in a corporate body, a person, i. e., parliament.

Strange as it seems, allegiance was not due to the person possessed with the supreme power in the state. It is apparent, therefore, that in the English system sovereignty was not synonymous with the supreme power in the state; that the former was a limited power; the latter absolute and unlimited.

The king was a sovereign in the sense that all citizens of all ranks were subject to him and owed allegiance, not to the people of England, not to the laws of parliament, but to the person of the king (24).

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of natural justice and the welfare of the community, but by the forms and the principles of our particular constitution. If this doctrine be not true, we must admit that kings, lords and commons have no rule to direct their resolutions, but merely their own will and pleasure; they might unite the legislative and executive power in the same hands and dissolve the constitution by an act of parliament." Woodfall's Junius, pp. vi, vii. See also Stockdale v. Hansard, [1839] 9 Ad. & El. 1; 36 E. C. L. 1.

23 Inglis v. Trustee, 3 Pet. 158; Marbury v. Madison, 1 Cranch, 137.

24 Inglis v. Trustee, 3 Pet. 158.

The king was the head of the kingdom, a constituent part of parliament; he held his power of no one. Within the kingdom he represented no one but himself; was personally accountable to no one for what he might do, in fact he held his office as an absolute right. But after the convention of 1688 this sovereign and king was not the supreme power in the state.

§ 109. **Extravagant claim of power at the beginning of the American Revolution.** When Mr. Blackstone wrote, he asserts as the prevailing doctrine in England, that whatever the forms of government, "however they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside. . . . By the sovereignty power is meant the making of laws; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put upon it" (25).

§ 110. **Contrary view in America.** The resistance of the American colonies, well begun in 1765, subsequently ripened into an absolute and specific denial of the unwarranted assumption of power by parliament. The consummation which resulted in the Revolution resulted from the attempt by Parliament to exercise the power of legislation over the colonies, in violation of the ancient principles of consent and representation, and the assent to this by the king resulted in such a state of affairs as to justify, according to the idea of the same commentator,

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[25] 1 Blk. Com. 49. See Id. 160.

the right of revolution, of which there were several precedents (26).

If there were earls or lords or knights among the colonists who rebelled, their rank ceased when allegiance was renounced, and by the declaration of the whole that all were equal (27).

The colonists insisted upon two ancient principles, or rather one principle embodying two ideas, as the basis of all law, namely: that no law was of any effect which was passed without the consent of the governed given by the representatives (28).

§ 111. How the people of the United States obtained supreme power. The framers of the Declaration of Independence evidently had in mind the precedent furnished by the convention parliament of 1688-89, which declared the throne vacant (29), of which Blackstone says: Parliament held "that the misconduct of King James amounted to an endeavor to subvert the constitution; and not to an actual subversion or total dissolution of the government, according to the principles of Mr. Locke: which would have reduced the society almost to a state of nature; would have leveled all distinctions of honor, rank, offices and property: would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity" (30).

[26] 1 Blk. Com. 211-245. See Wilson's speech in vindication of the colonies, 2 Works, 501.

[27] Swift's System of Laws, 27; Jameson, Const. Con., sec. 13.

[28] 2 Wilson's Works, 507, 508.

[29] Inglis v. Trustee, 3 Pet. 158.

[30] 1 Blk. Com. 213.

§ 112. **When allegiance was renounced all power returned to the people.** A very slight change in the words of Blackstone describing the action of the convention parliament of 1688 describes the acts of the convention which framed the Declaration of Independence. They therefore very prudently declared the action of the king to amount to no more than an abdication of government (31), for they declare that the king had repeatedly dissolved representative houses and refused to cause others to be elected, "whereby the legislative powers incapable of annihilation have returned to the people at large for their exercise." They also declared that the king had combined with others (meaning the English parliament) "to subject us to a jurisdiction foreign to our constitution and unacknowledged by our law, giving his assent to their acts of pretended legislation." Then follows a recital of what these pretended acts of legislation were, namely: depriving them of trial by jury, altering fundamentally the forms of government, and then this recital, referring evidently to the declaratory act, "for suspending our own legislature and declaring themselves (parliament) invested with power to legislate for us in all cases whatsoever;" and finally, "he had abdicated government here by declaring us out of his protection and waging war against us."

According to the theory of Blackstone, that there must exist somewhere, in all governments, an absolute despotic power (32), which idea forms a distinctive branch of his definition of law, the colonists, by

[31] Id. See Declaration of Independence.

[32] 1 Blk. Com. 48, 162.

declaring independence and equality, and that the legislative power had returned to the people, put themselves in identically the position which he described where he says the devolution of power to the people at large includes in it a dissolution of the whole form of government established by that people; reduces all the members to their original state of equality, and, by annihilating the sovereign power, repeals all the positive laws whatsoever (33).

According to the doctrines of political law as they obtained in England, the action of the colonists, as evidenced by the Declaration of Independence, reduced the individuals who inhabited the colonies to a state of nature; for, says Blackstone, "when civil society is once formed, government at the same time results of course, as necessary to preserve and keep that society in order. Unless some superior be constituted whose commands and decisions all the members are bound to obey, they would still remain in a state of nature without any judge upon earth to define their several rights and redress their several wrongs. But as all members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be intrusted?" (34).

§ 113. **The declaration of equality destroyed personal sovereignty.** Here it is that the learned commentator confounds society with government, and very naturally; for with him the parliament is the great body politic, the state, and also the government, and the people are no more, no less, than individual subjects (35).

33 1 Blk. Com. 213.

34 Id. 48, 213.

35 Shar. Blk. 48, 213, notes; 1 Wilson's Works, 270, 271.

It is evident that the framers of the Declaration of Independence did not acquiesce in the view that such acts repealed all their laws; for while they deny the powers of parliament over them upon the ground that they are not represented, and declare that the crown has abdicated the government, they do not admit that their laws are repealed (36).

It was a well known rule that a change in form of government, or in the persons who exercise it, does not repeal existing laws (37).

At the time of the Declaration of Independence the colonists affirmed that they had existing among them what they had brought with them, developed and possessed as their birthright, the common law of England, which they contended was founded upon two ancient pillars—consent and representation (38). Throughout all their subsequent acts and doings they professed to observe the principle that all authority was derived from the people they represented, either expressly given or impliedly ratified (39), thus extending any idea of the supremacy of any person or class over the whole mass or any member thereof, and they did not agree that because there were

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[36] Society v. New Haven, 8 Wheat. 464; Inglis v. Trustee, 3 Pet. 158. See also Webster's reply to Calhoun; Marshall's argument in Ware v. Hylton, 3 Dall. 232.

[37] American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 540; C. & P. Ry. Co. v. McGlinn, 114 U. S. 542-46.

[38] The binding force of an act of parliament arises from the idea of representation, and that every citizen is a party to it and consents to it. Middleton v. Crofts, 2 Atk. 654; Matthews v. Burdett, 2 Salk. 673. See also 1 Blk. Com. 234; Swift's System of Laws, p. 27; Inglis v. Trustee, 3 Dall. 158.

[39] Ware v. Hylton. 3 Dall. 232. See 2 Wilson's Works, 566.

no inequalities of rank nor any orders of nobility they were and must remain without laws (40). It must be confessed that they stood as Englishmen never stood before—equals in rank, equals in right.

§ 114. Consent of equals the basis of American law. The inhabitants of the colonies, by declaring that all men were created equal (41), and further declaring that governments must derive their just powers from the governed, placed themselves in a position never occupied by Englishmen nor recognized by the English constitution.

The theory adopted by Blackstone, that both government and law were swept away, was not admitted.

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40 1 Wilson's Works, 321.

41 The Declaration is, not that all men are created *free* and *equal*, or born free and equal. The Declaration is frequently misquoted. The origin of the principle stated in the Declaration, that "all men are created equal," is frequently accredited to French publicists, and the language ascribed to Thomas Jefferson and his associates who penned the last draft of the document. Prof. Hammond says: "The Declaration beginning with the statement that all men are *born* free and equal," etc., and adds (in language translated almost literally from the writings of Voltaire) (1 Ham. Blk. 276), thus seeming to credit Voltaire with the invention of the language of the Declaration. An objection to Hammond's statement is that he himself misquotes the words, and it is not easy to see how a *translation* can be *literal*—it may be liberal. See 2 Wilson's Works, 507, note.

It is well in such matters to be exact. August 17, 1774, James Wilson, in a speech in vindication of the colonies, said: "All men are by nature equal and free; no one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it; such consent was given with a view to insure and to increase the happiness of the government above what they could enjoy in an independent and unconnected state of nature. The consequence is that the happiness of the society is the *first* law of every government." A comparison of the second clause of the Declaration of Independence with this clause of the address discloses that every essential idea of the former is expressed in the latter, except the right of separation, which it would have been injudicious to have then expressed. See 2 Wilson's Works, 507, 508.

The lawyers of the colonists had imbibed other notions of the nature of law and government. The solution of the problem of self-government involved an examination of that branch of Blackstone's definition of law wherein it is asserted that the "law is a rule prescribed by the supreme power in the state." This is the basis and pith of the whole matter.

In the great case of Chisholm v. Georgia the supreme court went to the very root of this question of sovereignty while commenting upon the principle announced by Blackstone, which at that time obtained sanction from the Crown party in England (43).

Justice Wilson in his opinion says: "This position is only a branch of a much more extended principle upon which a plan of systematic despotism has been lately formed in England and prosecuted with unwearying assiduity and care. Of this plan the author of the Commentaries, if not the introducer, was at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and this side of the Atlantic, been implicitly and generally received by those who neither examined their principles nor their consequences. The principle is that all human law must be prescribed by a superior. This principle I mean not now to examine. Suffice it at present to say that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the

[43] This was a new doctrine and was not universally approved.

consent of those whose obedience they require. The sovereign, when traced to his source, must be found in the man" (44).

In his lectures before the Philadelphia Law School in 1791 he had investigated that question with care. He pertinently inquires: "Is it essential to law that inferiority should be involved in the obligation to obey it? Are these distinctions at the root of all legislation? . . .

"If I mistake not, this notion of superiority which is introduced as an essential part in the definition of a law—for we are told that a law always supposes one superior who is to make it—this notion of superiority contains the germ of the divine right" . . . "Despotism by an artful use of 'superiority' in politics, and scepticism by an artful use of 'ideas' in metaphysics, have endeavored—and their endeavors have frequently been attended with too much success—to destroy all true liberty and sound philosophy. By their baneful effects the science of man and the science of government have been poisoned to their very fountains." Professor Hammond says truly: "By these arguments Judge Wilson has shown that Blackstone's definition ranked him, in spite of himself, with the supporters of divine right and absolute power" (45).

§ 115. **Legislative power not supreme or absolute.** It is in his fifth chapter, the subject of which is "Of Municipal Law," that he eradicates root and branch this heresy in political doctrine. He says: "In regard to this point in the definition, I must beg leave to assign the epithet

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44 Chisholm v. Georgia, 2 Dall. 458.

45 1 Ham. Blk. note 11, p. 112.

'dangerous and unsound.' It is of high import to the liberties of the United States that the seeds of despotism be not permitted to lurk at the roots of our municipal law" (46). He then examines Blackstone's exposition of the legislative power and the powers of parliament, and as to the idea that there is and must somewhere be absolute and despotic power, as implied by this definition, says: "Let us now pause and reflect. After what we see can be done, after what we see has been done (in the United States), in the delegation and distribution of the rights and powers of society, can we subscribe to the doctrine of the Commentaries, that the authority which is legislative must be supreme? Can we consent that this doctrine should form a first principle in our system of municipal law? Certainly not. This definition is not calculated for the meridian of the United States" (47).

Blackstone seems to have omitted to notice the opinion of the judges of England that the binding force of an act of parliament arises from the idea of representation, and that every citizen, as a party to it, consents to it (48).

§ 116. **Official power is never allowed as a personal right.** Having seen the origin and nature of sovereignty and that its essential attributes are inequality and unlimited power, and noticed that inequality and personal superiority are repudiated by the Declaration of Independence, it remains to inquire whether this society of equals has created or recognized, as inhering in any per-

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[46] 1 Wilson's Works, 159-60.

[47] Downs & Bidwell, 182, U. S. 244.

[48] 1 Wilson's Works, 160-175; Middleton v. Cross, Atk. 65; Matthews v. Burdette, 2 Salk. 672; 1 Shar. Blk. 147, note.

son, body or class, the other attribute, viz., unlimited power. The first peculiar principle is the republican one, that official power is never exercised as of personal right (49). In England two branches of the legislative body exercised their authority as of individual right; that is, the king, because he was king, had a voice in legislation, and likewise the lords, because they were lords, had a voice, and when they voted or acted they voted or acted for themselves and in their own right and not as representing or acting for any one else. Judicial and executive power were exercised by the king as of right. The only representative body was the Commons, and historically their right in the parliament was originally derived from a command to send representatives to parliament, which ripened into a right by long usage (50). In a democracy, inasmuch as, theoretically, all may participate in legislation, each exercises these rights for himself, and does not delegate anything excepting the executive administration of these democratic laws. In America, by reason of the equality of the citizens, the principle naturally existed, by virtue of their situation, that no individual or body had any right or authority over any one else, and it naturally resulted that no power or authority should be exercised excepting by the consent of the governed and through representatives chosen for that purpose.

§ 117. **The people expressly limit their power.** They established also another novel principle. Experience had

[49] Swift's System of Laws, 27.

[50] Id. 26; Webster's Argument in Luther v. Borden, 7 How. 1; 2 Wilson's Works, 573.

taught them by many examples (51) that legislative power by the many or the few might be abused, and the declaration that the legislative power had returned to the people at large, coupled with those just mentioned, namely, that government derived its powers from consent, and that men were equal, resulted in a situation which is well expressed in the preamble to the constitution of Massachusetts (52), wherein the people of that state acknowledge the goodness of Providence in affording them an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit and solemn compact with each other, and of forming a new constitution of civil government for themselves and their posterity, in which, after explicitly declaring the rights of the citizens of the commonwealth, they declare that they establish it to "the end that it might be a government of laws and not of men" (53).

§ 118. All legislative power is limited. In America there are recognized two distinct branches of legislative power (54): The one political, exercised originally, in the formation of the United States constitution, by the electors as the immediate representatives of the people, and now habitually exercised in assemblages which have become familiar in the states under the name of constitutional conventions, and properly so, because they are confined in their actions to the enactment of fundamental or

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[51] See a great many cited in arguing and deciding Stockdale v. Hansard, 9 Ad. & El. 1; s. c., 36 E. C. L. R. I.

[52] 1780.

[53] Mass. Const. 1780; Marbury v. Madison, 1 Cranch, 137.

[54] Cooley's Blk. (3d ed.) 161. This subject will be more fully treated in connection with the legislative power.

political legislation (55); the other, the ordinary legislation exercised by congress or the general assemblages existing in all the states—always exercised by representatives chosen by the electors (56). None of the legislatures have any power to make changes in the constitution. In England a constitutional convention was unknown (except the revolutionary bodies unwarranted by the constitution) (57). Parliament possessed and exercised all legislative power. In America only the people can make changes in the constitution. The people of the United States have made provision for amendments proposed to them by congress or devised by themselves at a constitutional convention, though in all cases the legislative assemblies must be consulted, while the people of the states usually act in the latter mode. When the people make a constitution they are acting politically; they are agreeing upon fundamental laws for the purpose of limiting the exercise of authority; and it is settled law that they can and have set limits upon the extent and mode of law-making even by themselves.

The new principle which pervades all of their acts, viz., that no power shall be exercised as of personal right, but officially as a trust (58), resulted in an entirely new application of the old idea of representation, and put a new aspect upon the doctrine of consent very different from the old idea. It was the voluntary consent of equals, not the submission of subjects.

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55 See Grimke's Argument, State v. Hunt, 2 Hill (S. C.), 16.

56 U. S. Const., arts. I and V.

57 See Jameson on Const. Conv., § 8.

58 2 Dall. 472 (Jay, J.).

They did not cast off old principles and disregard ancient landmarks. The liberty of our fathers was not the license of anarchy, but the liberty of law (59). Long before the constitution, James Wilson in the Pennsylvania

59 Cooley's Principles, 23; Dodge v. Woolsey, 18 How. 331. "The clearest and most concise analysis of the general features of our political system may be found in the celebrated argument of the eminent statesman and great constitutional lawyer, Mr. Webster, in the case of Luther v. Borden, 7 How. 1, in the supreme court of the United States, which arose out of what is known as the 'Dorr Rebellion.' He said in substance that the only source of political power is in the people; that they are sovereign, that is to say, the aggregate community, the accumulated will of the people, is sovereign, but that *it is not the sovereignty* which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish a government, invest it with so much of the sovereign power as the case requires, and this sovereign power being delegated and placed in the hands of the government becomes what is familiarly called the *state*. The next principle is that, as the exercise of legislative power and the other powers of the government immediately by the people themselves is impracticable, they must be exercised by representatives of the people. The basis of this representation is suffrage. The right to choose representatives is every elector's part in the exercise of sovereign power. To have a voice in it, if he has the proper qualifications, is the portion of political power belonging to every elector. That is the beginning. That is the mode in which power emanates from its source and enters into the hands of conventions, legislatures, courts of law, and the chair of the executive. Suffrage is the delegation of the power of an individual to some agent. Then follow two other great principles of the American system. The first one is that the right of suffrage shall be guarded, protected and secured against force and against fraud; and the second is that its exercise shall be prescribed by previous law,—that every man entitled to vote may vote; that his vote may be sent forward and counted, so that he may exercise *his part* of sovereignty in common with his fellow-citizens. There is another principle equally true, that the people often limit themselves, and set bounds to their own power, to secure the institutions which they have established against the sudden impulses of mere majorities, and also that they may limit themselves by their constitutions in regard to the qualifications of the electors and the qualifications of the elected. Webster's Works, vol. 6, pp. 221-227, cited by the court with approval in In re Duncan, 139 U. S. 461. See Vanhorne's Lessee v. Dorrance, 2 Dall. 308." State v. Cunningham, 81 Wis. 440, 497, 498.

convention asserted that "the law is the common standard by which the excesses of prerogative as well as the excesses of liberty are to be regulated and conformed," plainly indicating that they understood both that power and liberty might have excesses, and were to be regulated.

The formation and existence of state governments ever since the Declaration of Independence were based upon voluntary consent (60).

§ 119. **The natural right of revolution is recognized.** There is inherent in the people a justifiable right (a sovereignty, if one chooses so to term it) to abolish or alter the existing form of government whenever it is found inadequate to the purposes intended. It ought not to be denied by us, having been asserted by our forefathers and exercised by them. But it is quite as frequently forgotten that this is nothing more or less than a justification for the exercise of revolution. A minority may as justifiably rebel as a majority; indeed, the colonists were not a majority of King George's subjects (61).

§ 120. **The original consent required was individual consent.** All fellow-subjects among the colonists who so desired were allowed to retain their allegiance to the king (62). But when it is said that government is established by consent, the question arises, By the consent of whom? The consent of the people as a body or the consent of the individuals? It is an axiom in American law that government derives all its just powers from the con-

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60 Ware v. Hylton, 3 Dall, 232.

61 Jameson, Const. Con., § 239; State v. Hunt, 1 Hill (S. C.), 172; Bliss on Sov., p. 143; Luther v. Borden, 7 How. 1.

62 1 Shar. Blk. 47, Note.

sent of the governed (63), and not from the submission of subjects to a government promulgated by a supreme power. As a political fact, as a practical fact, as a legal fact, the consent involved is the consent of the individual; and this established the supreme law and made it obligatory upon each and all. How was consent given? Judge Sharswood says: "It is to be remarked that in the freest nations, even in the republics which compose the United States, the consent of the entire body of the people has never been expressly obtained." "The people" comprise all of the men, women and children of every age and class, but they were not one people in the same sense until the constitution was adopted. A certain number of men have assumed to act in the name of all the community (64).

This doctrine of consent as a political doctrine is not acquiesced in by all of our prominent politicians. As a matter of course the doctrine receives support from the so-called Socialists, and is also acquiesced in by Democrats. On the other hand there are a certain class very indefinitely described as Imperialists, who repudiate the idea of consent as having any efficacious operation in American or English law (65).

For example, Senator Platt of Connecticut has said that governments derive their just powers from the consent of some of the governed. So distinguished a scholar

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[63] Fed., No. 40. The Declaration of Independence asserts it.

[64] Ware v. Hylton, 3 Dall. 232.

[65] The great difficulty of discussing such political views is the indefinite meaning of such words as socialist, democrat, imperialist, etc., but as here used these words are confined to men who also profess to believe in an efficient constitutional system of government.

as Senator Lodge refers to the consent theory as a mere aphorism, "a fair phrase that runs trippingly on the tongue." And the New York Outlook says that "we do not believe that government rests upon the consent of the governed."

Perhaps these distinguished citizens have overlooked the fact that the Declaration of Independence does not affirm that government rests upon consent, but that "the just powers of government are derived from consent." Against these modern politicians we may safely array the language and position of Mr. Justice James Wilson, one of the fathers of the Constitution; and the republication of his works has in a measure revived the true theories of the Constitution, and brought back the government to the original lines upon which it was projected.

This doctrine is of such immense importance to the problem of self-government as to justify a still more extended explanation.

In an extended review of the works of James Wilson (edited by the author of the present article) a reviewer in so dignified a paper as The Nation, used the following remarkable language, directed to the topic of Consent, as expounded in the writings of Wilson: "It cannot be honestly said that Wilson's abstract speculations of law are of much greater value than those of Puffendorf, though they are one degree more modern. He (Wilson) traces law to custom and consent. It has been proved over and over again since his time that this is mere assumption opposed to facts of history. Law had its origin

(66) partly in brute force, partly in custom, and partly in regulations, enforced by a sovereign." That such a view should be held by one who has the right to use the editorial "we" in so prominent a paper as The Nation, is reason enough for examining a doctrine so much at war with the theories of our jurisprudence. Perhaps an author should, as I have heretofore done, preserve silence as to matters stated in reviews of his own efforts, but the statement facilitates making clearer the different theories in such a way as perhaps to enforce their attention more upon those who chance to read the book. It will not be denied that every one who would exercise rights under our Constitution and in our Society and participate in our politics should have a clear conception of the nature of the society, government and principles of politics.

It is not proper to speak of the opposing views and theories known as the compact theory and consent theory as if they were peculiar inventions of Puffendorf and Wilson respectively. They were but expounders and advocates of different political theories.

The theory of Puffendorf's was one which Blackstone and others at various times endeavored to establish as a part of the theory which should govern in England. Our Revolutionary fathers, assisted by Pitt and Burke in the English Parliament, repudiated the compact theory as the governing one in British jurisprudence, and advocated the theory of consent. A majority of Parliament defeated Pitt and Burke, and for a time supported the Tory

[66] This is a fair specimen of the quality of reasoning indulged in by many politicians. The question is not one of the origin of Law or of Government, but of the basis of the Government of the United States of America.

theory. The American statesmen and patriots at once repudiated the action of Parliament and declared their independence.

According to the theory of which Puffendorf was the expounder, the officers to whom powers of government are granted, are superior to the other members of the same society. The view expounded by Wilson is that those to whom the reins of government are entrusted are agents exercising a delegated authority, entirely official in its character, and not affecting the personal status of the officer.

The assertion of the reviewer that law had its origin partly in brute force, partly in custom, and partly in regulations enforced by a sovereign, supported though it is by the dignity of the editorial we, lacks relevancy in the one essential particular, viz: its application to the system of law which applies to the society known as the United States of America. The argument is not what is the historical basis as to how rules were originally promulgated and enforced, but what is the basis of the right to promulgate and enforce rules in this Republic. Before the Declaration of Independence these things were abstract academic speculations. That document took a step in advance and extended the argument in the form of an axiomatic postulate.

The original compact theory, advocated by Puffendorf and Blackstone, is precisely what was objected to and repudiated, because it involved submission, established inequality and admitted that the making of laws was not by consent, but the command of a supreme sovereign. As a theory, that adopted by Wilson and his co-laborers

is not a whit more modern than that of Puffendorf's. It was espoused by Locke and Montesquieu, but in English Law it has lasted longer. The theories have still each their advocates in various parts of the world. Conflict between the two was and is irrepressible. They cannot exist in the same society and at the same time (67). The repudiation of the one in America was final.

Since the review was written, the views expressed by the reviewer have been condemned, and those of the writer supported by an authority which should naturally cast the scale in the favor of the side he espouses.

Lord Russell in his celebrated address on International Law and Arbitration, delivered before the American Bar Association at Saratoga in 1896, considered the nature of International Law, and in the course of his remarks stated that "even in Societies in which the machinery exists for the making of Law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the Law Merchant. Under later developments of arbitrary power laws may be regarded as the command of a Superior with a coercive power in Austin's sense. In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by a coercive authority,

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67 "See 'English Political Philosophy' page 62, by William Graham, Professor of Jurisprudence at Queen's College, Belfast. Commenting on Locke's theory of 'Consent' which was borrowed and amplified by Rousseau, Professor Graham writes: 'It is true that unless they (governments) finally rest on the unforced and willing consent or agreement of the people or the majority they are not free governments.'" Quoted from Annals of the American Academy of Political and Social Science, vol. XVIII, p. 29.

and acquire more and more the character of customary law founded on consent. Savigny indeed, says of all law, that it is first developed by usage and popular faith, then by Legislation, and always by internal silently operating powers, and not mainly by the arbitrary will of the Law giver. . . . What then is International Law? I know of no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another. . . . In fine, International Law is but the sum of those rules which civilized mankind have agreed to hold as binding in the mutual relations of States. As we are not to-day considering the history of International Law, I shall say but a word as to its rise and then pass on to the consideration of its later developments and tendencies. Like all Law in the history of human societies it begins with usage and custom, and unlike Municipal Law, it ends there. . . . For, just as within the individual state custom gives rise to law, so for the human race as a whole, usages have led to the growth of the laws of nations." It may therefore safely be adopted as a political postulate obtaining in both of the great English speaking nations, that the modern foundation of law is consent. Indeed it is a criticism upon Blackstone's Commentaries that he omitted reference to the cases in the English law wherein the judges on solemn occasions, while deciding cases, affirmed that the law of England was based upon consent (68).

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[68] See 1 Wilson's Works, 396. The coronation oath of the present King of England illustrates precisely the two great positions of Anglo-American law, namely, the supremacy of law, and the theory that it

The position of the American Judiciary is well illustrated by the views expressed in a recent case decided in Wisconsin, State v. Kreutzberg.

"In this case we are confronted with that gravest of sociological questions: How far, consistently with freedom, may the rights and liberties of the individual member of society be subordinated to the will of the government? That question has been at war from the very first

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is the law of the people consented to by them through their constitutional representatives.

Lord chancellor—Is your majesty willing to take the oath?

The king—I am.

Lord chancellor—Will you solemnly promise and swear to govern *the people of this United Kingdom* of Great Britain and Ireland and the dominions thereto belonging according to the *statutes in parliament agreed on* and the respective *laws* and *customs* of the same?

The king—I solemnly promise so to do.

Lord chancellor—Will you to the utmost of your power cause law and justice in mercy to be executed in all your judgments?

The king—I will.

Lord chancellor—Will you to the utmost of your power maintain the laws of God, the true profession of the gospel and the Protestant Reformed religion established by law, and will you maintain and preserve inviolably the settlement of the United Church of England and Ireland, and the doctrine, worship, discipline and government thereof, as by law established within England and Ireland and the territories thereunto belonging, and will you preserve unto the bishops and clergy of England and Ireland and to the churches there committed to their charge all such rights and privileges *as by law* do or shall pertain to them or any of them?

The king—All this I promise to do.

The proclamation by which the death of the queen and the accession of Edward VII. is made public is issued through the prime minister and the archbishop of Canterbury, with the sanction of the privy council and reads as follows:

"Whereas, It has pleased the Almighty God to call to His mercy our late sovereign lady, Queen Victoria, of blessed and glorious memory, by whose decease the imperial crown of the United Kingdom of Great Britain and Ireland is solely and rightfully come to the high and mighty Prince Albert Edward. We therefore, the lords spiritual and temporal

existence of any form of government. For many centuries, while debated as an ethical and philosophical question, it was resolved in each instance by force or by the ability to exert force. A little more than a century ago the attempt was made by the American people to define the limits by written contract, and to withdraw their decision and vindication from the arena of physical strife and transfer it to the peaceful form of the judiciary'' (69).

§ 121. **The right of expatriation allows the constant exercise of assent or dissent.** ''Very plainly, then, it is essential to the American doctrine of consent to hold that every citizen shall have a right at any time to expatriate himself (70). How can the consent of the governed be in any sense implied if the citizen is coerced to remain a member of the state through all the changes which its

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of this realm, being here with those of her late majesty's privy council, with numbers of other principal gentlemen of quality, with the lord mayor, aldermen and citizens of London, do now hereby with one voice and consent of tongue and heart publish and proclaim that the high and mighty Prince Albert Edward is now by the death of our late sovereign of happy memory become our only lawful and rightful liege Lord Edward, by grace of God King of the United Kingdom of Great Britain and Ireland, defender of the faith, to whom we acknowledge all faith and constant obedience, with all hearty and humble affection, beseeching God, by whom kings and queens do reign, to bless our royal King Edward with long and happy years to reign over us."

69 State v. Kreutzberg, 114 Wis. 530, 91 American State Rep. p. 935.

70 "Prima facie, and as a general rule, the character in which the American antenati are to be considered will depend upon, and be determined by, the situation of the party and the *election* made at the date of the Declaration of Independence, according to our rule; or the Treaty of Peace, according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election is at all admitted, it must be determined in most cases by what took place during the struggle, and between the Declaration of Independence and the Treaty of Peace. To say that

form of government may undergo, whether with or without his approbation (that would be submission). It is clear that in any such case he may remove himself and his property to any country he chooses, and he must be allowed reasonable time to make his election. This course was adopted at all periods of the American Revolution. All persons, whether natives or inhabitants, were considered entitled to make their choice either to remain subjects of the British crown or to become citizens of one or other of the United States. This choice was necessarily to be made within a reasonable time'' (71).

The majority of a colony, upon assuming to be an independent state, did not assume, against the will of the minority of the inhabitants, the right to make them members of the state. In order, therefore, to make such persons members of the state, there must be some overt act of consent on their own part to assume such a character, and then, and then only, could they be deemed to have determined their right of election. The consent of each individual could in no other mode be practically ascertained (72).

§ 122. **All political action was taken in the name of the people.** In all societies some must originally assume to act. In some societies those who assume to act assume to

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the election must have been made before, or immediately at, the Declaration of Independence, would render the right nugatory. The doctrine of perpetual allegiance is not applied by the British courts to the American antenati. This is fully shown in the late case of Doe v. Acklam, 2 Barn. & Cres. 779." Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 121.

[71] 1 Shar. Blk. 47, note 11.

[72] Inglis v. Trustees, 3 Pet. 158.

act in their own right, thus usurping the right to govern. This is the origin of feudal sovereignty (73). In the formation of our governments, by express declaration, those who assumed to act, in each step towards the formation of this government, have assumed to act, not on their own behalf, not of right, but in a representative capacity. "In the name of the good people of these colonies" (74), or in the name of the people. It is only such acts as are professedly performed that can, according to the rule of agency, be ratified. By accepting and ratifying such acts, they are made the acts of each individual. The doctrine of consent, by exercising the right of election after a reasonable period within which to exercise it, is the basis of each man's consent to the form of government (75). The

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73 Chisholm v. Georgia, 2 Dall. 479.

74 Declaration of Independence.

75 Declaration of Independence; Inglis v. Trustees, 3 Pet. 160; Talbot v. Jansen, 3 Dall. 13. "From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is ordained and established in the name of the people; and is declared to be ordained 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance and could not be negatived by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, 'in

fact of acknowledging this right of choice involves the admission, on the part of those assuming to act, that they were acting for others.

The convention of 1787 acted in autre droit (76). The action of the convention of 1787 and the adoption of the present constitution has been said to have been revolutionary; but the delegates who met in convention were careful not to violate the fundamental principle which had been adopted by all bodies of Americans as the polestar of all their acts when in convention assembled, namely: That all persons and all assemblages assuming to act or advise should assume to act in the name of the people, and while so acting should never perform an act having any force or validity from the mere performance, but deriving force and validity and life by virtue of previous instruction or subsequent ratification of the people, a principle guaranteeing absolute safety; for, whether beyond the constitutional bounds or within them, the rejection of the proposed rule in one case nullified the act, and the approbation of it in the other had the effect of blotting out antecedent errors and irregularities (77).

§ 123. The sanction of the constitution was its adoption by the people. Therefore, the present constitution, being before its adoption an unauthorized proposition, was submitted to the people for adoption, assent and ratification,

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order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly upon the people, the necessity of referring to the people, and of deriving its powers directly from them, was felt and acknowledged by all." M'Culloch v. Maryland, 4 Wheat. 316, 403.

[76] In the right of another.

[77] Fed., No. 40.

and not published and prescribed (78). The convention was not a convention of the people of the United States (79). There was no authority to call a general convention of the people (80). Indeed, Rhode Island never took part in the convention and sent no delegates to it. It was submitted to the citizens of the thirteen states, between whom existed a league, not because there was any authority from each of the thirteen to formulate a plan and submit a draft, but simply because of the plenary power of any body of freemen to submit a proposition to any other body or individual, when impelled to do so from the exigency of the occasion. It did not bind any individual till he assented to it. It did not affect any state or government, therefore, till its citizens, through their representatives, assented to it. It did not bind the people of any state until and unless eight other states joined with them. It then only bound those who adopted it, and when thus adopted by nine states it dissolved the league and ceased to be a proposal, and became a constitution.

§ 124. **The act of adopting the new constitution violated the compact of confederation between the states.** Because it did not require the ratification of all the states it was in disregard of the articles of confederation, which provided that the compact could not be superseded without the unanimous consent of the parties to that instrument, and North Carolina and Rhode Island not ratifying it (the latter not taking any legal steps in recognition of it),

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78 Duer's Outlines, sec. 859.

79 Fed., No. 40.

80 Baldwin's Views, 11 Pet. (App.) 19.

had the legal right to insist that the act was revolutionary, and so it was (81).

§ 125. **The autonomy of the states was preserved.** But the ratification did not dissolve the states. The citizens of the ratifying states became citizens also of the new state called under the old name—the United States (82), —and then, and then only, were the people created one people and one nation (83). The old confederacy was a league between states and depended upon state action, having no means of enforcing individual obedience. The constitution of the United States creates direct relations between the United States government and individuals (84). Webster, in his reply to Calhoun, says: "The constitution utters its behests in the name and by the authority of the people, and it exacts not from states any plighted public faith to maintain it. On the contrary, it makes its own preservation depend on individual duty and individual obligations (85). The states cannot, by neglect, stop the wheels of government. The individual oath of office of the state legislative bodies to support the constitution of the United States compels them to act at stated terms (86).

§ 126. **The relation of the people, the states and minorities.** It is often said that the people are sovereign,—that

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81 Duer's Outlines, sec. 855; Cooley's Prin. 16; Fed. Nos. 40-43; Baldwin's Modern Political Institutions, p. 12.

82 Scott v. Sanford, 19 How. 393; White v. Hart, 13 Wall. 650.

83 Miller on Const., 83; Baldwin's Views, 11 Pet. (App.) 19.

84 White v. Hart, 13 Wall. 650; Iredell, J., in Chisholm v. Georgia, 2 Dall. 335.

85 Iredell, J., in Chisholm v. Georgia, 2 Dall. 435.

86 Ibid.; Duer's Outlines, 214. See also Ex parte Yarbrough, 110 U. S. 651.

is, the whole mass is sovereign because they created the constitution; and it is asked, Is not the creator sovereign to the creature? But the people of the old confederacy did not act en masse or as citizens of one great body politic in creating the constitution (87). Rhode Island never participated in the constitutional convention, and North Carolina did not ratify until long after nine states had ratified. Confusion about this question arises from treating different things as the same thing because they are called by the same name. The political unity was created by the constitution, consisting of eleven states and the people thereof; that is, the artificial person as we see it now, then came into being, and then, for the first time, were known citizens of the United States (88). The members of the old confederacy were states of the new nation, individuals and states. It is their universal consent to the terms of this instrument which creates the body politic called the United States.

§ 127. Republican form of government described. In England government was based on sovereignty; here it is derived from citizenship. There obedience depended upon subjection; here it depends upon consent. Submission and allegiance imply inequality; consent assumes equality. Allegiance was a badge of inferiority; citizenship is the charter of equality. In the United States there are citizens but no subjects. There is no oath of allegiance other than to support the constitution and laws (89).

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87 Worcester v. Georgia, 6 Pet. 515-569; Cooley's Lectures (Ann Arbor, 1889), p. 33; Von Holst's Const. Law, 48; Fed., No. 40.

88 Miller on Const., 83; Scott v. Sanford, 19 How. 393; White v. Hart, 13 Wall. 650.

89 State ex rel. McCready v. Hunt, 2 Hill (S. C.), 1.

To the constitution of the United States the term sovereignty is unknown. Government is exercised by magistrates who perform official duties and exercise delegated powers. By destroying inequality and applying the doctrine of delegated power to all subjects and departments of government and establishing a public service without rank or jura potestas, they destroyed the idea of sovereignty (90) and established a government republican in form, to define which so exactly that nothing could be added and nothing taken away is perhaps beyond the wit of man. Republicanism requires, as asserted, that magistracy be derived from the great body of the society, not from an inconsiderable portion or from a favored class of it; and it is sufficient for such a government that the magistrates be appointed directly or indirectly by the people, and that they hold their offices for a limited period or during good behavior (91).

The form of government is not democratic. This government is not democratic in form or in substance, although the people reserve and exercise political power (92). In this republic, while all power is derived from the great body of the people, they never in a single instance actually participate as a body in the administration of government (93). Representation is the essential feature of the republic, and it is sufficient for such a government that

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90 Ham. Blk. 141; Webster's Reply to Calhoun.

91 Fed., No. 43; Chisholm v. Georgia, 2 Dall. 457; State v. Johnson, 25 Miss. 745.

92 State v. Johnson, supra.

93 Jay, C. J., in Chisholm v. Georgia, 2 Dall. 452, see State v. Johnson, supra.

the people reserve and exercise political power; power must be delegated or lie dormant (94).

§ 128. **Limitation of all power.** The assent of each individual is coupled with the agreement of every other individual that they all and each shall be bound by the terms expressed in the constitution. By adopting the acts done in convention on their behalf and expressed in the proposal for a constitution, the people in their double capacity, as individuals and citizens of states (95), established a constitution providing for a common government over all concerning certain objects, preserving the separate state governments for other objects, each of which was to be perpetual and each supreme within the limits prescribed, and this proposal, when assented to, changed its nature from a proposal to a constitution; and this constitution is the only grant, warrant, charter or authority to which any person, whether body politic, class or individual, can refer as justifying the assertion and exercise of power. The objects were expressed in the preamble to form a more perfect union (of individuals and states), establish justice and secure liberty; and the more perfectly to do this, they declare that the constitution and laws made in pursuance of it, and all treaties made under the authority of the United States, shall be the supreme law of the land, and the judges in every state bound thereby, notwithstanding any state constitution or state laws in contravention thereof (96).

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94 Gibbons v. Ogden, 9 Wheat. 1. It was at this point that the democracy of Greece was weak. 1 Kent Com. *232. See Downs v. Bidwell, 182 U. S. p. 244 at p. 279.

95 Dodge v. Woolsey, 18 How. 331.

96 Const., art. VI; 2 Hill (S. C.), 1.

It is sometimes asserted that sovereignty in the people exists as an original right, inhering as a necessary attribute, and this claim takes the form that the people have absolute, uncontrolled power and can constitutionally do anything. If this be true, then Blackstone was right, and absolute, uncontrolled, despotic power exists in this government. When a government, whatever the form, grants a constitution, it necessarily remains supreme over it (97).

Constitutional amendments. When a constitution results from the agreement of equals, it is entirely consistent with their dignity that they obligate themselves to the observation of its provisions in reference to changes or modifications, and it is essential to its character as a constitution that it be the supreme rule of conduct for all persons under all circumstances (98). The doctrine of the inherent, absolute power of the people is in substance, though differing somewhat in form, that the right to adopt a constitution necessarily includes the right to abolish, reform and to alter any existing form of government; that this right exists as a right of sovereignty and is not derived from human authority, and may be and must be effected to such an extent and in such manner as the people may determine. It is now settled that such action is the exercise of revolutionary powers and not sovereignty (99), that the people of the United States can make no changes in the United States constitution except in the manner provided by that instrument for

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97 Cooley's Const. Hist. Am. Law, 31.

98 Dodge v. Woolsey, 18 How. 331.

99 Cooley's Const. Hist. Am. Law, 31.

constitutional amendments (100), that the people of the United States are limited as to what changes (in form or substance) may be made by the provisions of the constitution (101), and that by the constitution the people divested themselves of the sovereign power of making changes in the fundamental law except by the method in the constitution agreed upon (102).

That any attempt by the whole people, or by any majority of them, or any portion of them, to accomplish the same in any other mode, would be legally nugatory, unconstitutional and revolutionary, and that the people have expressly guarded themselves against the will of majorities and have rendered themselves incapable of destroying the autonomy of the states, by guaranteeing to each a republican form of government (103).

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100 Luther v. Borden, 7 How. 1; State v. Hunt, 2 Hill (S. C.), 1; Wells v. Bain, 75 Pa. St. 39; Koehler et al. v. Hill, 60 Iowa, 568; State v. Young, 29 Minn. 509.

101 Iredell, J., in 2 Dall. 419.

102 Cooley's Prin. 23; Gibbons v. Ogden. 9 Wheat. 1.

103 See Amendment of State Constitutions.

Constitution—Amendments to.—"The constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. But it is not only over the departments of the government that the constitution is supreme. It is so, to the extent of its delegated powers, over all who made themselve parties to it, states as well as persons, within those concessions of sovereign powers yeilded by the people of the states when they accepted the constitution in their conventions. Nor does its supremacy end there. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two-thirds of both houses shall propose them, or where the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which, in either case, become

"A government," says Justice Miller, "which holds the lives and liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is after all a despotism. It is true it is a despotism of the many, of the majority, if you chose to call it so, but it is none the less a despotism. It may be well doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than many. The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere" (104).

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valid, to all intents and purposes, as a part of the constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by congress." Dodge v. Woolsey, 18 How. 331 (348).

[104] Loan Ass'n v. Topeka, 20 Wall. 662. See In re Duncan, 139 U. S. 449-461. Downs v. Bidwell, 182 U. S. 244-358.

CHAPTER IX.

THE PEOPLE OF THE STATE.

§ 129. Identity of the people. Attention may now be directed to another entity possessing rights, powers and duties, namely, that other great person called a STATE, using the latter word in its familiar sense as designating a member of the national union.

The individuals constituting a state have as such no political but only civil rights, except as an organized body, that is, except when acting by its recognized organs. The entire population of a state already constituted (that is, organized under a constitution), were it assembled on some vast plain, could not constitutionally pass a law or try an offender (1).

States existed prior to the adoption of the constitution and still exist as component parts of the greater person —the United States. One of the provisions of the constitution, and one doubtless without which its adoption could not have been obtained, is the clause guaranteeing to each of the states a republican form of government. This clause in the constitution operates in a double way. It is a limitation upon the powers of the people and of the United States in favor of the people of the states, and se-

1 Jameson, Const. Conv. 237.

cures the preservation of the autonomy (2) of the states (3).

§ 130. States are essential constituents of the nation. It is also a limitation upon the powers of the majority of the people of a state in favor of each and every citizen thereof, insuring to the individual that the form of government of the state, as well as of the nation, shall be republican. Doubtless it had its origin in the jealousy of the states of the danger of encroachment of the nation upon the powers of the states (4); but in actual operation, it justified the prediction that the encroachment would most likely come from the states (5).

The reconstruction of the seceded states was largely based upon this provision (6).

§ 131. Position of the state as to independence. It was at first generally supposed that the sovereignty of the people of the states, even in the qualified sense as designating their independence and exemption from the juris-

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2 See Bouvier's Law Dict., tit. Autonomy.

3 Texas v. White, 7 Wall. 725. "'The people of each state compose a state, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union there could be no such political body as the United States.' Not only therefore, can there be no loss of separate and independent autonomy to the states through their union under the constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the national government. The constitution, in all its provisions, looks to an indestructible Union composed of indestructible states." Texas v. White, 7 Wall. 725. See Reconstruction.

4 Miller, Lect. on Const., 596.

5 Ibid.

6 Texas v. White, 7 Wall. 700; White v. Hart, 13 Wall. 646. The report of the Committee on Reconstruction treats the subdued seceding states as conquered persons having no rights. See Reconstruction.

diction or control of any higher authority, was destroyed or given up by entering into the Union, and it is settled law that a state may be sued in a United States court. From this fact alone, it follows that if the obligation to submit to a tribunal not created by itself is inconsistent with sovereignty, then a state is not, in that sense, sovereign (7). It was decided by the supreme court that the people of the United States had the power to create and had created a tribunal having jurisdiction over a state at the suit of an individual (8).

Although that suit was one against a state by a citizen of another state, it is now settled that it is immaterial whether the citizen suing is a resident or a non-resident of the state sued (9). That according to the letter of the constitution, a state might be sued by an individual is admitted by all (10), but by the eleventh amendment, the courts are prohibited from so construing the constitution; the provision being that the constitution must not be construed as giving jurisdiction to the United States courts over a suit by a citizen against a state (11).

§ 132. A state cannot be sued by an individual except by consent. The decisions have been uniform that a state cannot be sued in any court by an individual without its consent (12). The attempts to invent reasons other than the letter of the law have been uniformly lame. The

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7 N. H. v. La., 108 U. S. 7.

8 Chisholm v. Georgia, 2 Dall. 416.

9 Hans v. Louisiana, 134 U. S. 1.

10 Baldwin's Views, 11 Pet. (App.) 19.

11 Infra, § 132.

12 Hans v. Louisiana, 134 U. S. 1; State v. Young, 29 Minn. 509; N. Dak. v. N. C., 192 U. S. 286; N. H. v. La., 108 U. S. 76.

federal court has appellate jurisdiction of a suit by a state against an individual (13). The palpable injustice of the rule has led to several ingenious devices to avoid its application (14), such for example as the assignment of the cause of action to a person competent to sue, (e. g. a state), which, however, must be a real assignment (15). The sufficient reason for the rule is found in the expression, "it is the written law"; the motive for it throws no light on its application (16).

§ 133. An individual contracts with a state at his peril. It is now well settled that there is no judicial remedy in favor of an individual against a state to compel the performance of a contract (17), though it is settled that a state can pass no law impairing the obligation of a contract once made (18). The only security for state loans rests on the plighted faith of the state as a political community; that is, upon the same basis as contracts with independent governments (19). States are not, like nations, independent of each other, and are not permitted to allow the use of state names for the purpose of enforcing claims really owned by individuals (20).

As to torts and active injuries: It is no answer to a

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[13] Cohen v. Virginia, 6 Wheat. 264.

[14] These are examined in the recent case. North Dak. v. North Carolina, 192 U. S. 286.

[15] Cf. N. H. v. La., 108 U. S. 76, with N. D. v. N. C. supra.

[16] Chappell v. United States, 34 Fed. Rep. 673.

[17] State v Young, 29 Minn. 509; Hans v. Louisiana, 134 U. S. 1.

[18] Murry v. Charleston, 96 U. S. 432, is an instructive case on this subject.

[19] These are apparent exceptions to the maxim ubi jus ibi remedium. Stanley v. Schwally, 147 U. S. 518; State v. Young, 29 Minn. 509.

[20] N. H. v. La., 108 U. S. 76; N. Y. v. La., Id.

tort (21) or an active infringement of a right (22) or a threatened injury (23) that the action was taken or is proceeding under supposed official duty or by virtue of official power; such cases are not damnum absque injuria.

§ 134. **Limitation on their mode of action.** Within the limits and in regard to these subjects over which they have undoubted jurisdiction (24), the people of the states have no absolute, uncontrolled authority (25). The people of a state can only act through the legally constituted agencies of the law (26). They cannot change, alter or amend the constitution except in the modes provided by the existing law (27); and these are either through the action of a constitutional convention or the submission of amendments by the legislature, as pointed out by the constitution; but the constitutional convention cannot act independently of the existing state authority.

§ 135. **The national constitution is supreme.** A provision in the constitution of a state in contravention of the constitution of the United States is void, though contained in the constitution when the state is admitted into the Union.

An amendment of the state constitution in contraven-

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21 Belknap v. Schild, 161 U. S. 17.

22 Kilburn v. Thompson, 103 U. S. 168; U. S. v. Lee, 106 U. S. 196; Tindel v. Wesley, 167 U. S. 204.

23 Smythe v. Ames, 166 U. S. 466.

24 Id. See Dillon Laws & Jur. 227; Tindal v. Wesley, supra.

25 Not even as to taxation. Murry v. Charleston, 96 U. S. 432.

26 Luther v. Borden, 7 How. 1.

27 Koehler et al. v. Hill, 60 Iowa, 568; In re Duncan, 139 U. S. 449-61.

tion of the United States constitution is void, though accompanied with all the formalities of the law (28).

Treaties are placed by our constitution on a footing with the supreme law and beyond the power of the legislature to violate (29).

§ 136. Amendments of state constitutions. Though all new provisions are within the unquestioned powers of the people, those which are adopted without observing the forms prescribed in the existing state constitution, are void (30).

An amendment of a state constitution, all the provisions of which are within the undoubted powers of the state, which is not made through the ordinarily existing state agencies for determining the will of the people, is revolutionary and void (31).

The people of a state cannot lawfully secede from the Union (32). They may be compelled to establish a government republican in form (33).

The people of a state cannot act en masse—they must choose representatives (34).

The people act immediately through electors or voters, who are the immediate representatives of the great mass of the people.

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[28] State v. Hunt, 2 Hill, 1; State v. Young, 29 Minn. 509; Bigelow v. Draper. 6 N. Dak. 152.

[29] The Diamond Ring, 184 U. S. 540; Downs v. Bidwell, 182 U. S. 244, 383.

[30] Koehler v. Hill, 60 Iowa, 568.

[31] Luther v. Borden, 7 How. 1; Koehler v. Hill, 60 Iowa, 568.

[32] Texas v. White, 7 Wall. 721.

[33] Id.; White v. Hart, 13 Wall. 646.

[34] Jameson on Const. Conv., §§ 237, 348

§ 137. **Nature of suffrage.** The right to vote in American commonwealths is not of the same origin as the right to vote in England (35). This will be explained under the qualifications of citizens to vote. Suffice it to say here, that the right to vote is not a natural right—it is purely conventional (36).

§ 138. **Voters are agents of the people, not rulers.** Sometimes when we speak of the people of a state we do not allude to the whole body of inhabitants, but generally to the people in connection with the exercise of political power. It is said by an able lawyer that then the mind turns from the whole body to that portion of them in whom is constitutionally vested the right to exercise the power of suffrage (37). The decision in that case seems to have been the basis for the expression by a text-writer that, as a practical fact, the sovereignty is vested in those persons who are permitted by the constitution of the state to exercise the elective franchise (38).

Neither the arguments of Mr. Drake nor the opinion of the court warrants such a conclusion. The judge of the court in that case drew the line sharply between the right of the English freeholder to vote as an incident to his tenancy in burgage, under which doctrine the right to vote was a vested right, and the privilege or franchise in America, saying the right to vote is not vested—it is

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[35] Luther v. Borden, 7 How. 1; Blair v. Ridgley, 41 Mo. 63; State v. Hunt, 2 Hill (S. C.) 1. See McCrary on Elections. §§ 9, 10, 11.

[36] Ibid; Jameson, Const. Conv. 331-2.

[37] Mr. Drake in argument, Blair v. Ridgley, 41 Mo. 63.

[38] Cooley's Const. Lim., p. 40.

purely conventional (39). Noticing that in some states those who were originally allowed to vote had been by the constitution divested of the power, he said: "We presume the lawmakers considered that they were not discreet persons to be intrusted with the ballot" (40). The electors, as an actual fact, as a practical fact, as a legal fact, are the agents and representatives of the people (41).

§ 139. **The new meaning of sovereignty.** There are jurists of high standing who insist that sovereignty does not mean anything in America, and should be dropped from our legal nomenclature, but it is not the province of an author to dictate what our nomenclature shall be. A text-writer must take the terms of the law as found in daily use in judicial arguments, and his humble province is to ascertain and explain, as near as may be, the sense in which the term is appropriately used.

Sovereignty, like many other words which have come to us from other days, has changed with the development of the law, and the idea associated with the use of the word is not at all synonymous or even analogous to the old idea which the word represented. Even so, this word "sovereignty" in American law, though not found in the constitution (42), has been in constant and daily use in American law, but is dissociated from both the ideas

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[39] Blair v. Ridgley, 41 Mo. 63. See this question exhaustively examined in a note by the author, 2 Wilson's Works, 566. Also McCrary on Elections, supra.

[40] Blair v. Ridgley, 41 Mo. 63.

[41] Jameson on Const. Conv., pp. 324, 331-333, 335, 337, 352, 354; Pomeroy, Const. Law, pp. 5-28; Penhallow v. Doane, 3 Dall. 54.

[42] See Chisholm v. Georgia, 2 Dall. 219.

which it bore in the English law at the time of the Revolution. Sovereignty does not mean unlimited, absolute power, nor does it mean personal authority; but sovereignty, when properly applied to the people of the United States as a political entity, may properly, in a guarded sense, mean personal superiority; that is, that there is a public person from which all power emanates, than whose will there can be not other superior authority (43).

The people are sovereign in the limited sense that there is no external power which can be recognized as having authority over them, and likewise there can be no internal tribunal with inherent powers, that is, powers not granted by the people, which can have jurisdiction over them. Therefore, there having been no judicial tribunal created by the constitution with express jurisdiction of a suit against the United States, the doctrine naturally followed, not because of any analogy between the people and the king of Great Britain, not because the people cannot be bound by the obligations of a law, but because they have not seen fit to invest any such tribunal with such power (44).

Doubtless the word has had a bad effect upon American law, and, because of its evil associations and improper use, it had been well had the same silence been observed by the lawyers which was observed by the people in the constitution (45)

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[43] Bouvier's Institutes, §§ 13, 149, 150, 182. See Downs v. Bidwell, 182 U. S. 244, at p. 359.

[44] Martin v. Hunter, 1 Wheat, 304, 329. See note, 136 U. S. 606; Marbury v. Madison, 1 Cranch, 137.

[45] Bliss on Sov. 175; Smith's Right & Law, §§ 508-22.

§ 140. The method by which the people bound themselves. We may now safely affirm that the sovereignty of the people consisted in this: that being originally equal in rights and without any superior, they had a right to establish any form of government upon any terms they could agree upon; that without violating the ancient principle that government derived its just powers from the consent of the governed, no majority had the right to coerce the minority.

Second. That it was competent for them, by the terms of the constitution, to agree upon the manner in which all power should be exercised, and that all jointly, or any portion of them, should have no right to change the fundamental law in any manner other than by the modes therein provided (46).

Third. That they did so agree and did set plain limitations upon the exercise of all power by themselves, as well as by those to whom they delegated the exercise of the government, and did agree upon the republican principle that the people cannot act en masse, but must act through representatives. That they, by their constitution, created the judicial power independent of and coordinate with the legislative branch, and clothed with a power and duty unknown (47) to governments where sovereignty was recognized—namely: to declare null and void any acts of the people, whether exercised through their electors or by the legislatures, or the executive, or

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[46] Marbury v. Madison, 1 Cranch, 137.

[47] Cohen v. Virginia, 6 Wheat. 264; Cooley, Const. Lim. 58, notes; Marbury v. Madison, 1 Cranch, 137; Justice Field's Address, 134 U. S. (App.) 737.

by all combined, which contravene the fundamental law; and finally, they have declared the constitution to be the supreme law of the land, and binding upon all individuals, bodies politic, magistrates or agents (48).

§ 141. Government of law established. We may summarize the following acts of the people destructive of the then existing notions of sovereignty as evidenced by their constitutional documents. They abolished rank and established equality. They limited power and the manner of its exercise. They created a tribunal with power to define the limits of right and interpret, construe, expound and apply the law, whose duty it is to declare void acts contrary to the constitution. They abolished personal allegiance and substituted an oath of citizenship to obey and support the constitution and enforce the law (49). The supreme object is declared to be to establish justice and secure the blessings of liberty, to the end that this may be a government of laws and not of men (50).

The chief principle now firmly established by the constitution (51) is an equality in rights and in obligations, wherein is exhibited that jus aequum, that equal law, in which the Romans placed true freedom (52). Very apt is the illustration taken from the custom of the Spaniards of Arragon, who, when they elect a king, introduce

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48 "The constitution," says Justice Davis, "is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances." Ex parte Milligan, 4 Wall. 120.

49 State v. McCready, 2 Hill (S. C.), 1.

50 Mass. Dec. of Rights; Marbury v. Madison, 1 Cranch, 163.

51 Fourteenth Amendment.

52 Wilson's Works, 308. See Santa Clara Co. v. Railway Co., 18 Fed. Rep. 398; Connolly v. Union Sewer Pipe Co., 184 U. S. 540-60.

as in a play a personage whom they dignify by the name of law—"La Justiza of Arragon." This personage they declare, by public decree, to be greater and more powerful than their king (53).

§ 142. **The fundamental principles of self-government.** But one conclusion can be drawn from the facts surrounding the institution of this government and the experience of the century upon the question of the nature of the power of legislation, whether in the people or elsewhere, and in relation to the nature of law and the doctrine of unlimited power. The result is the destruction of personal sovereignty in the many or the few, and the substitution of the obligation of consent as the vital principle of law. Whether it consists in the plighted faith of the nation by way of treaty, the behest or limitation of a constitution, a statute duly enacted, or a system universally adopted, they are all, in truth and form, of the people, by the people, for the people,—the actual application of the theory of self-government.

The crowning achievement of our ancestors was the subordination of all powers to the supremacy of the law.

The conception of an independent tribunal, with the untried and far-reaching power of nullifying acts of other departments of government, is the best proof of the scope of their wisdom and the strength and boldness of their purpose (54). The events of intervening history

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53 See infra. note 54.

54 It is not quite fair to affirm that the expedient of a judicial tribunal with power to declare void acts of other departments was entirely unknown. In his opinion in Chisholm v. Ga., 2 Dall. 460, Justice Wilson calls attention to a former experiment. Dr. Robertson, the fa-

have proven that this is a desideratum in any scheme of self-government essential alike to the preservation of the liberty of the individual, the power of the states, and the perpetuity of the Union.

A learned advocate of codification has spoken of the Romans as "that magnificent people which once ruled the world by the sword, and have since held a half do-

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mous Scotch Historian, gives the following account in his history of Charles the Fifth: "The feudal form of government, with all the institutions which characterize it, was thus (in Spain) preserved entire in Castile and Aragon, as well as in all the kingdoms which depended on these crowns. There were certain peculiarities in their political constitutions which distinguished them from those of any other country in Europe.

"*The royal prerogative, extremely limited in every feudal kingdom,* was circumscribed, in Spain, within such narrow bounds, as reduced the power of the sovereign almost to nothing.

"*The privileges of the nobility* were great in proportion, and extended so far as to border on absolute independence.

"*The immunities of the cities* were likewise greater than in other feudal kingdoms. They possessed considerable influence in the cortes, and they aspired at obtaining more. * * *

"*The form of government* in Aragon was monarchical, but the genius and maxims of it were purely republican. The kings, who were long elective, retained only the shadow of power; the real exercise of it was in the cortes or parliament of the kingdom. This supreme assembly was composed of four different arms or members. The nobility of the first rank; the equestrian order, or nobility of the second class; the representatives of the cities and towns, whose right to place in the cortes, if we may give credit to the historians of Aragon, was coeval with the constitution; the ecclesiastical order, composed of the dignitaries of the church, together with the representatives of the inferior clergy. No law could pass in this assembly without the assent of every single member who had a right to vote. * * *

The Supreme Court or Justiza.—"Not satisfied with having erected such formidable barriers against the encroachments of the royal prerogative, nor willing to commit the sole guardianship of their liberties entirely to the vigilance and authority of an assembly, similar to the diets, states-general and parliaments, in which the other feudal nations have placed so much confidence, the Aragonese had recourse to an institution peculiar to themselves, and elected a justiza, or supreme judge. This

minion by the silent empire of law'' (55); and even so, an American may point with pride to the triumphs of American genius in all the arts of peace and war; but I doubt not the grandest and most enduring achievement of this people is that which has crowned the first century of its existence, and is expressed in the post-bellum amendments to the national constitution, wherein is indeed accomplished the purpose intended by the framers of the original document—the establishment of equality and justice, the equality of all before the law, justice to all according to the forms of law—the essential principles of liberty.

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magistrate, whose office bore some resemblance to that of the ephori in ancient Sparta, acted as the protector of the people and the comptroller of the prince. The person of the justiza was sacred, his power and jurisdiction almost unbounded. He was the supreme interpreter of the laws. Not only inferior judges, but the kings themselves, were bound to consult him in every doubtful case, and to receive his responses with implicit deference. An appeal lay to him from the royal judges, as well as from those appointed by the barons, within their respective territories. * * *

The Nature of Allegiance.—"It is evident, from a bare enumeration of the privileges of the Aragonese cortes as well as of the rights belonging to the justiza, that a very small portion of power remained in the hands of the king. The Aragonese seem to have been solicitous that their monarchs should know and feel this state of impotence to which they were reduced. Even in swearing allegiance to their sovereign, an act which ought naturally to be accompanied with professions of submission and respect, they devised an oath in such a form as to remind him of his dependence on his subjects. 'We,' said the justiza to the king, in name of his high-spirited barons, 'who are each of us as good and who are altogether more powerful than you, promise obedience to your government, if you maintain our rights and liberties; but if not, not.' Conformably to this oath, they established it as a fundamental article in their constitution that, if the king should violate their rights and privileges, it was lawful for the people to disclaim him as their sovereign, and to elect another, even though a heathen, in his place." See 5 Wheat. (App.) p. 31, note 2; Chisholm v. Georgia, 2 Dall. (Justice Wilson's opinion), p. 460.

[55] D. D. Field's Address to Am. Bar. Ass'n, 1889, p. 233.

This liberty is not the license of anarchy, but the wholesome liberty of citizenship. Neither is it the whim of the multitude. "It will be well," says Chief Justice Day, "if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty" (56).

The municipal law of the United States is not the will of the people as passion or clamor may incline them, not the will of the mob or commune, but their deliberate and right judgment, expressed in conformity to the constitution, to which every man yields obedience, nor knows any other allegiance. The protection of the constitution attends every one everywhere, whatever be his position in society, his social or official position, his financial situation or his religious belief. Justice Field says truly: "The constitution is the shield which the arm of our blessed government holds at all times over every one, man, woman and child, in all its broad domain, wherever they may go and in whatever relations they may be placed" (57).

Truly sayeth one: "The old-time omnipotence of the English sovereign, succeeded in our day by the omnipotence of the English parliament, has no place in our political system, no analogue in our political vocabulary" (58).

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56 Koehler v. Hill, 60 Iowa, 616.

57 County of Santa Clara v. Southern R. Co., 18 Fed. Rep. 398.

58 Const. Hist. in Am. Law, p. 286.

CHAPTER X.

THE PUBLIC DOMAIN.

§ 143. **Growth of colonial union.** The problem of achieving independence, and establishing a republican form of government, was successfully worked out in the two decades which fall within the Revolutionary period. The very act of establishing a national union with a government co-extensive with the boundaries of all the states brought with it problems not capable of immediate solution in accordance with the same principles acted upon in building the nation.

The nature of the union existing between the people after the Declaration of Independence and prior to the adoption of the present constitution is not necessarily within the range of our discussion.

There was, however, important action taken during this period, which had an intimate relation to the action taken subsequently and upon important questions which subsequently arose in reference to our public domain. It will perhaps aid us in understanding these questions to make a few observations upon the state of the union prior to and during the revolutionary period.

§ 144. **Epochs of the evolution of the national union.** The time contemplated may be divided into four periods:

First. A period antedating what may be termed the Revolutionary period, or the union of all the colonies.

Second. From 1765 to 1776 the struggle was to maintain their constitutional rights as British freemen, not to separate from the British crown.

Third. From 1776 to 1783 the struggle was for independence and a closer unity.

Fourth. From 1777 to 1789 was the period of evolution of the national constitution (1).

Opinions will naturally differ as to the nature of many of the acts taken, as to whether they were taken as one people, united under the bonds of society, or whether the action was taken as thirteen independent colony states. It is safe, however, to assert that during no period of this time had any of the states individually assumed and exercised the attributes of independent states, and assumed the station of an independent nation (2).

§ 145. **Ante-revolutionary conventions.** This same period of time presents various phases of political unity.

Long before any thought of forcible resistance entered the minds of the colonists, and while they were in apparent harmony with the mother country, the colonists united themselves by an additional bond other than that implied by the relation of common subjects of one sovereign. It will be useful in this connection to observe what has been heretofore alluded to, that the selection of a common personal sovereign was not considered upon feudal principles to be a surrender of national integrity. The same may be said of a league or alliance for mutual protection by way of offensive or defensive action.

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[1] See Downs v. Bidwell, 182 U. S. 249.

[2] See Downs v. Bidwell, 182 U. S. 250—Harlan, J., dissent, p. 376.

As early as May in the year 1637, steps were taken towards an alliance between Plymouth and Massachusetts colonies. In August of the same year, another movement was said to have taken place between Connecticut and New Haven. These failed of success, as did others subsequently taken.

In the year 1642, however, a common danger from the French, the Dutch and the Indians had the effect of bringing about the first actual confederation of the united colonies of New England. The same question which defeated former attempts was the chief obstacle in the way of accomplishing the union, namely: the relative voting power of each one in the general assembly, the larger colony of Massachusetts not being satisfied with an equal vote, and the smaller colonies insisting upon an equal voice.

This matter was, however, finally adjusted, and the assembly adopted an organic law, the substance of which is —as follows:

First. "The colonies of Massachusetts, Plymouth, Connecticut and New Haven do agree and conclude that they will hereafter be called and known as the United Colonies of New England."

Second. "The said United Colonies, for themselves and their posterities, do jointly and severally thereby enter into a firm and perpetual league of friendship and amity for offense and defense, mutual advice and succor upon all just occasions for their mutual safety and general welfare."

Third. "Each colony retains its distinct and separate jurisdiction and control over its domestic and local af-

fairs, institutions and laws. No colonies are to be joined in one jurisdiction, nor any other colony admitted into the confederacy, without the consent of the whole."

Fourth. "The expense of wars and other general expenses shall be borne in proportion to the number of male inhabitants between sixteen and sixty years of age in each colony."

Fifth. "Upon notice from any colony of an invasion, the other colonies shall immediately furnish aid."

Sixth. "The general assembly is composed of two commissioners from each colony, to meet annually on the first Monday of September." This assembly had jurisdiction to determine all affairs of war and peace, and other matters pertaining to the general welfare, "but not to intermeddle with the local affairs of the colonies." A two-thirds vote was sufficient to carry into effect any proposed measure; if less concurred, the majority could submit the measure to the respective governments for decision.

Seventh. Provides for the annual election of the president.

Eighth. "The assembled commissioners are authorized to enact general regulations of a civil nature for preserving the peace and to regulate intercourse with Indian tribes."

Ninth. Provides for the return of runaway servants, etc (3).

Tenth. Provides against hasty or inconsiderate wars by any colony.

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3 Kentucky v. Dennison, 24 How. 100.

Eleventh. Provides for calling special meetings of the general assembly.

Twelfth. "That the confederacy shall be perpetual. If any of the confederates shall break the articles of confederacy, the matter shall be duly considered and adjudged by the commissioners of the other colonies, 'so that the peace and the confederation shall be entirely preserved without violation.' "

If this document is examined in connection with the principles of feudal polity, it may be affirmed that the fact of the existence of a common sovereign, while it does not prevent complete national independence, does not permit the union of any two nations or independent societies. If the document is examined in view of the effect of its own provisions upon the character and capacity of the new person or society created by it, or the relation of its parts, it is apparent that it effected a very great change in the relation which before that time existed between the colonies. The exercise of great national affairs is confided to the general assembly, and to a colony is allowed jurisdiction only over local affairs, and the authority over national affairs is expressly taken away.

When, in addition to this, jurisdiction is given to the general assembly to determine whether any colony was guilty of a breach of the articles, it is plain that the colonies which became parties to this contract divested themselves of some of the supreme attributes of independence, and became, in some measure, united under one constitution and one system of government.

We shall not overlook, however, that this early constitution embraced only a small portion of what was afterwards the thirteen united colonies.

§ 146. Extension of the union. In 1754 Virginia and all of the northern colonies assembled at Albany, in New York, and considered a proposition submitted by Dr. Franklin to form a closer union. It was not, however, until 1765 that a convention was projected which should create an American congress, and have for its object the knitting together of every region as fast as settled. It was certain that the intention of all concerned was to form an American union. Opinions have always differed and views will always be divergent as to whether, in fact and in truth, there was before the constitution of 1787 a real national union of the states, of such a character as to surrender their sovereignty and independence.

The character of the town meetings, continental congresses and general courts, through which the people expressed their voice prior to the congress of September 7, 1774, speak no certain and unambiguous voice on this matter (4).

§ 147. Nature of the union during the revolution. Upon the relation of the states and the character of the union from this time forth, we have judicial utterances which sufficiently express the sentiment which finally prevailed. Mr. Justice Chase, in Ware v. Hylton (5), says: "It has been inquired what powers congress possessed from the first meeting in September 1774, until the ratification of

[4] Tucker's History of the Constitution is perhaps the strongest statement of the adverse view.

[5] 3 Dall. 232. See Texas v. White, 7 Wall. 724-25.

the articles of confederation on the 1st of March, 1781? It appears to me that the powers of congress, during the whole period, were derived from the people they represented, expressly given, through the medium of their state conventions or state legislatures; or that after they were exercised they were impliedly ratified by the acquiescence and obedience of the people. After the confederacy was completed, the powers of congress rested on the authority of the state legislatures and the implied ratification of the people. It was a government over governments. The powers of congress originated from necessity, and arose out of, and were only limited by, events; or in other words, they were revolutionary in their very nature. Their extent depended on their exigencies and necessities of public affairs. It was absolutely and indispensably necessary that congress should possess the power of conducting the war against Great Britain, and therefore, if not expressly given by all (as it was by some of the states), I do not hesitate to say that congress did rightfully possess such power. The authority to make war, of necessity implies the power to make peace, or the war must be perpetual. I entertain this general idea, that the several states retained all internal sovereignty, and that congress properly possessed the great rights of external sovereignty.

"The articles of confederation adopted in 1781 contained a clause upon which has been based the contention of the independent sovereignty of the states. It is therein expressly stated that each state retains its sovereignty, freedom and independence.

"The Declaration of Independence has an important bearing upon the construction to be placed upon the articles of confederation. Was it in character the act of a united people, or the act of independent states? The address is: 'We, therefore, the representatives of the United States of America, in general congress assembled'" (6).

§ 148. **Territory ceded by the states.** Pursuant to amicable adjustments, all territory held or claimed by states and outside the boundary fixed was ceded to the United States by the states owning or claiming to own such territory. In this manner the first territory outside of the limits of the original states was acquired (7), and the necessary consequence of acquiring territory was the devising of some means of governing and disposing of it (8).

The ordinance of 1787. The people of the states, ceding to the general government their unoccupied territory, made provision for the establishment of a republican

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[6] See Pomeroy's Const., sec. 52; Jameson, Const. Conv., sec. 27.

[7] See Loughborough v. Blake, 5 Wheat. 324; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511.

[8] This was provided for in the old articles of confederation and in the new constitution of 1787.

Art. 4, sec. 3, embraced this subject. This section is as follows:

"§ 3. *First.* New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

"*Second.* The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

form of government therein. This was accomplished by the celebrated ordinances of 1787 (9).

It provided for the preservation of the civil rights of the inhabitants and for the formation of states out of the territory, so soon as the inhabitants had become sufficient in number to be entitled to the position of a state.

This ordinance plainly indicated that the United States was not to treat the parts of this territory as permanent colonies, but they were to be continued in the condition of territories only during such period of development as was deemed essential to bring them to the dignity and numerical strength necessary for the duties of statehood.

§ 149. Relation of the ordinance to the Constitution. The ordinance was a natural and proper means of preserving the rights of inhabitants of states who, by a new

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9 In Scott v. Sanford it was held that the ordinance did not remain in force after the adoption of the constitution. In Pollard v. Kippe, 14 Pet. 417, the opposite and better view was held. See Mr. Justice White's opinion in Downs v. Bidwell, 182 U. S. 319-20. Webster's views are as follows: Mr. Webster said: "Let me say that in this general sense there is no such thing as extending the constitution. The constitution is extended over the United States and over nothing else. It cannot be extended over anything except over the old states, and the new states that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, *and espccially professional and judicial gentlemen.* It seems to be taken for granted that the right of trial by jury, the habeas corpus, and every principle designed to protect personal liberty, is extended by force of the constitution itself over every new territory. That proposition cannot be maintained at all. How do you arrive at it by any reasoning or deduction? It can only be arrived at by the loosest of all possible constructions. It is said that this must be so, else the right of the habeas corpus would be lost. Undoubtedly these rights must be conferred by law before they can be enjoyed in a territory." Benton's Ex., pp. 132-33.

adjustment of boundaries, were thrown without the limits of the state of which they were citizens. It provided for a republican form of government for the territories. It was necessary to settle the political condition of the territories and guarantee the rights of the inhabitants. The ordinance was their constitution.

It has been contended that the clauses of the constitution above referred to did not confer upon congress the rights of government over the territories, because that had been provided for by the ordinance (10), but this idea has long since been abandoned (11).

§ 150. On the admission of a state the ordinance became no longer in force as to it (12). It was a question of doubt in many jurisdictions, and for a long time, whether the ordinance was to have perpetual force and continue forever a charter of the rights and liberties of the inhabitants of the Northwest territories (13).

§ 151. The acquisition of foreign territory. The right of the United States to acquire title to foreign territory by any of the modes recognized by the law of nations was one not free from difficulty, and not expressly provided for by the provisions of the national constitution.

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10 This is, however, no longer an open or a practical question.

11 See § 152, below.

12 Sands v. Manistee Co., 123 U. S. 288; Peo. v. Thompson, 155 Ill. 451; State v. Cunningham, 81 Wis. 440.

13 Illinois River Packet Co. v. Peoria Bridge Co., 38 Ill. 478. In the case of Hogg v. Zanesville, 5 Ohio, 410, the court says: "This portion of the ordinance (the 4th article) of 1787 is as much obligatory towards the state of Ohio as our own constitution. In truth it is more so." In the case of La Plaisance v. Monroe, 1 Walker Ch. (Mich.), 155, the court says: "The ordinance of 1787, in my opinion, is no part of the fundamental law of the state since its admission into the Union."

The articles of confederation contained a clause which involved in doubt general powers of the national government, viz., a provision that each state retain its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by the states expressly delegated to the United States in congress assembled (14).

The same subject is alluded to in the ninth and tenth amendments to the new constitution (15).

Diverse views stated. The national government being, according to the usual form of expression, one of enumerated powers, it became a question upon which great minds differed as to whether there was any power or authority in the government of the United States to expand the boundaries of the national domain.

President Jefferson, under whose administration the first foreign territory was acquired (16), was of the opinion that it was necessary that congress should submit to the nation at large an additional amendment to the constitution approving, confirming and ratifying the act of acquiring the territory of Louisiana, which he felt impelled by inexorable necessity to acquire. He said: "The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our union" (17).

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[14] See 1 Wilson's Works, 556.

[15] IX. "The enumeration, in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people." X. "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U. S. Const.

[16] Louisiana.

[17] Jefferson's Works, 499.

On the other hand there were those who held that the United States as a nation has an inherent right to acquire territory, and it is now established that the provisions authorizing the nation to make war and peace impliedly sanction the acquisition of territory (18).

No constitutional amendment was ever submitted or adopted enlarging the powers of the United States in this respect.

§ 152. **The doctrine of inherent power.** The suggestion that under the old confederation there were by virtue of the position as a nation, certain implied powers, was advanced in connection with another subject, namely, the exercise of the power to charter corporations (19). In the same connection, however, and as illustrating it, the power to make war and peace and acquire territory was mentioned. All arguments which have followed upon the power to acquire territory, the power to incorporate United States or national banks and indeed the power which sanctioned the legal tender acts, depend on this same principle.

The earliest statement of the doctrine of inherent power. James Wilson, afterwards Mr. Justice Wilson, discussed this question in his famous argument upon the power of the United States to incorporate the Bank of North America. He says: If, then any or each of the states possessed, previous to the confederation, a power, jurisdiction or right to institute and organize by a charter of incorporation a bank for North America—in other

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[18] Miller's Lect. on Const. 129. See especially Downs v. Bidwell, 182 U. S. 244.

[19] The same proposition involved in M'Cullough v. Maryland (p. 325, n. 75, above).

words, commensurate to the United States,—such power, jurisdiction and right, unless expressly delegated to congress, cannot be legally or constitutionally exercised by that body.

"But, we presume, it will not be contended that any or each of the states could exercise any power or act of sovereignty extending over all the other states or any of them, or, in other words, incorporate a bank, commensurate to the United States.

"The consequence is, that this is not an act of sovereignty, or a power, jurisdiction or right which, by the second article of the confederation, must be expressly delegated to congress in order to be possessed by that body.

"If, however, any person shall contend that any or each of the states can exercise such an extensive power or act of sovereignty as that above mentioned, to such person we give this answer: The state of Massachusetts has exercised such power and act; it has incorporated the Bank of North America. But to pursue my argument.

"Though the United States in congress assembled derive from the particular states no power, jurisdiction or right which is not expressly delegated by the confederation, it does not thence follow that the United States in congress have no other powers, jurisdiction or rights than those delegated by the particular states.

"The United States have general rights, general power and general obligations not derived from any particular states, nor from all the particular states taken separately, but resulting from the union of the whole (20).

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[20] This is an important statement in support of the doctrine of "Certain inherent principles limiting the powers of Congress." Downs v. Bidwell, 182 U. S. pp. 277, 280-281-282, 291, 295-298.

"To many purposes the United States are to be considered as one undivided, independent nation, and as possessed of all the rights, and powers, and properties, by the law of nations incident to such."

Rule for applying the doctrine. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature. The purchase, the sale, the defense, and the government of lands and countries, not within any state, are all included under this description. An institution for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

"The act of independence was made before the articles of confederation. This act declared that 'these United Colonies' (not enumerating them separately) 'the free and independent states, and that, as free and independent states, they have full power to do all acts and things which independent states may, of right do.'

"The confederation was not intended to weaken or abridge the powers and rights to which the United States were previously entitled. It was not intended to transfer any of those powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation, it continues vested in them still. The confederation clothed the United States with many, though perhaps not with sufficient powers; but of none did it disrobe them.

"It is no new position that rights may be vested in a political body which did not previously reside in any or in all the members of that body. They may be derived solely from the union of those members. 'The case,' says the celebrated Burlamaqui, 'is here very near the same as in that of several voices collected together, which, by their union, produce a harmony that was not to be found separately in each'" (21).

All modern statements trace to the same source and principle. Chief Justice Marshall presents the view which prevails in reference to the power to acquire external territory and the principles which obtain in reference to the government of them, as follows:

"The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory either by conquest or by treaty (22). The usage of the world is, if a nation be not entirely subdued, to consider the holding of the conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are

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[21] 1 Wilson's Works, pp. 557-560, notes.

[22] See the Insular tariff cases.—Downs v. Bidwell, 182 U. S. 244, and citation.

dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and the general conduct of individuals, remains in force, until altered by the newly-created power of the state" (23).

§ 153. The right to govern. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular state and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory (24). Whichever may be the source whence the power is derived, the possession of it is unquestioned.

§ 154. Title by purchase. By far the greatest area of territory has been acquired by processes other than the voluntary cession by the original states and the general convention of the people of the United States, and this, as we have seen in the last section, raises new and difficult questions (25).

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23 Am. Ins. Co. v. 356 Bales of Cotton, 1 Pet. 541.

24 The great chief justice clearly invokes both the idea of inherent and implied power. His language is not tautological, every word is required to fully express the two ideas.

25 Our first great acquisition was Louisiana in 1803. The northwestern extent of this territory was always a matter of controversy until settled by the treaty with England in 1846. 2 Whart. Int. Law Dig. 173. The claim to the Oregon territory, comprising the states of Washington and Oregon, was not allowed to rest alone upon the Louisiana purchase, but was also based on discovery and occupancy. The Florida

§ 155. **Annexation of independent countries.** When Texas had acquired her independence from Mexico, she took her place as a sovereign nation, and, upon the close of hostilities with Mexico, Texas became actually an independent nation. The annexation of Texas, as a state, with all the powers and capacities of statehood, presented a new question, different from any other which had before been passed upon by congress, that is, the capacity of the nation to combine with other nations without the consent of the states (26).

§ 156. **Acquisition of disconnected territory.** The acquisition of disconnected territory not contiguous to some portion of the public domain cannot always be justified upon the same ground which satisfied those who doubted the constitutional power to extend the original limits of the United States.

President Jefferson and the other close constructionists could very justly say that the nation was bound by the law of self-preservation to remove the dangerous ownership of any contiguous territory, but these arguments would not justify the addition to the United States of distant provinces not naturally or actually contiguous

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purchase was made in 1819, and our territory was extended from the southern boundary of Georgia on the Atlantic coast, southward to the Gulf of Mexico and westward until it joined the Louisiana purchase. California, Nevada, Utah, a portion of Wyoming, Colorado, New Mexico and Arizona were acquired from Mexico by the cession of 1848. This was another *peaceful acquisition* following close after the defeat of the ceding party. The Gadsden purchase of 1853 added the second Mexican territory, now included within the territories of Arizona and New Mexico. Alaska (in 1867) was a purchase pure and simple. The acquisition of Kansas, Colorado and New Mexico came by cession from Texas.

[26] No question has ever been raised as to the power; it clearly falls within the same principles invoked in acquiring Louisiana and Florida.

to our territory, and the ownership and control of which, in other hands, could not be said to constitute present or probable menace to our safety or prosperity (27).

The purchase of the territory of Alaska must be justified on other grounds than those of the exercise of necessary or proper means to effect an end within the objects enumerated in the constitution.

Judge Story, in his Commentaries, says: "There is no pretense that the purchase or cession of any foreign territory is within any of the powers expressly enumerated in the constitution. It is nowhere in that instrument said that congress, or any other department of the national government, shall have a right to purchase or accept of any cession of foreign territory. The power itself (it has been said) could scarcely have been in the contemplation of the framers of it. It is, in its own nature, as dangerous to liberty, as susceptible of abuse in its actual application, and as likely as any which could be imagined to lead to a dissolution of the Union. If congress have the power, it may unite any territory whatsoever to our own, however distant, however populous, and however powerful" (28).

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27 As we have shown, such a power was believed to exist by one of the most influential of the members of the convention, James Wilson. He expressly mentions it in his argument in 1782 (1 Works, 559), as an attribute of national existence. The question then is, was the power excluded by the terms of the constitution, not was it granted.

28 Judge Story continues: "Under the form of a cession, we may become united to a more powerful neighbor or rival, and be involved in European or other foreign interests and contests to an interminable extent. And if there may be a stipulation for the admission of foreign states into the Union, the whole balance of the constitution may be destroyed, and the old states sunk into utter insignificance. It is incredible that it should have been contemplated that any such overwhelm-

To justify the acquisition of such territory requires a still further stretch of power, and no argument can stop short of the one advanced by Judge Wilson, as heretofore pointed out (29), maintaining that there is an inherent power in the nation, including all objects legitimately within the national jurisdiction which have not been reserved to the states (30).

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ing authority should be confided to the national government with the consent of the people of the old states. If it exists at all, it is unforeseen, and the *result of a sovereignty* intended to be limited, and yet not sufficiently guarded. * * * The treaty-making power must be construed as confined *to objects* within the scope of the constitution. And, although congress have authority to admit new states into the Union, yet it is demonstrable that this clause had sole reference to the territory then belonging to the United States, and designed for the admission of the states which, under the ordinance of 1787, were contemplated to be formed within its old boundaries. * * * If it be said that it will be 'for the *common defense* and general welfare' to purchase the territory, how is this reconcilable with the strict construction of the constitution? * * * Such were the objections which were urged against the cession and the appropriations made to carry the treaty into effect. The friends of the measure were driven to the adoption of the doctrine that the right to acquire territory *was incident to national sovereignty;* that it was a resulting power, growing necessarily out of the aggregate powers confided by the federal constitution; that the appropriation might justly be vindicated upon this ground, and also upon the ground that it was for the common defense and general welfare. In short, there is no possibility of defending the constitutionality of this measure but upon the principles of the liberal construction which has been, upon other occasions, so earnestly resisted." Story on Const., sec. 1280.

[29] § 152, p. 363 above.

[30] Bryce's Am. Com. 368-374. "The history of the United States is in a large measure a history of the arguments which sought to enlarge or restrict the import of the constitution. One school of statesmen urged that a lax construction would practically leave the United States at the mercy of the national government, and remove those checks on the latter which the constitution was designed to create; while the very fact that some powers were specifically granted must be taken to import that those not specified were withheld, according to the old maxim expressio unius exclusio alterius, which Lord Bacon concisely explains by saying, 'as exception strengthens the force of a law in cases not ex-

§ 157. The governmental power in territories. The example of Louisiana will illustrate the extent of power (31).

"Louisiana was acquired in the spring of 1803; an extra session of congress was called to ratify the treaty of acquisition, and to provide for the occupation and government of the new posession.

"It was provided 'that until the expiration of the present session of congress, unless provision for the temporary government of the said territories be sooner made by congress, all the military, civil and judicial powers exercised by the officers of the existing government (32) (the French) of the same shall be vested in such persons, and shall be exercised in such a manner, as the president

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cepted, so enumeration weakens it in cases not enumerated.' It was replied by the opposite school that to limit the powers of the government to those expressly set forth in the constitution would render that instrument unfit to serve the purposes of a growing and changing nation, and would, by leaving men no legal means of attaining necessary but originally uncontemplated aims, provoke revolution and work destruction of the constitution itself. * * * *This latter contention derives much support from the fact that there were certain powers that had not been mentioned in the constitution, but which were so obviously incident to a national government that they must be deemed to be raised by implication.* For instance, the only offenses which congress is expressly empowered to punish are treason, the counterfeiting of the coin or securities of the government, and piracies and other offenses against the law of nations. But it was very early held that the power to declare other acts to be offenses against the United States, and punish them as such, existed, as a necessary appendage to various general powers. So the power to regulate commerce covered the power to punish offenses obstructing commerce; the power to manage the postoffice included the right to fix penalties on the theft of letters, and in fact a whole mass of criminal law grew up as a sanction to the civil laws which congress had been directed to pass." Bryce's Am. Com. 370.

31 But not the limitations thereof.

32 See 3 Wheat. 202 N. 1; 5 Wheat. Appx. 31.

of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion.' "

The bill emanated from a select committee, of which Mr. John Randolph was chairman; "but," says Senator Benton, "those who are familiar with the inside working of the legislative machinery know very well that the bill came from the department of state, supervised by the president himself." In this instance the special message of the president brought the subject before congress and asked for "temporary provision" for the government of the territory.

The bill was well calculated to startle a people who regarded any form of government except a republican one as despotic (33).

The inhabitants of the ceded territory, far from possessing political rights, were punishable arbitrarily for presuming to meddle with political subjects.

Not only was the nature of the government thus continued wholly incompatible with our constitution, but its machinery and appointment of officers was equally so. They were to be appointed by the president without the advice and consent of the senate.

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33 It continued in force the same form of government, with the identical magistrates, which had been established by the Spanish and French government—putting the president in the place of the king of Spain, putting all the territorial officers in the place of the king's officers, and placing the appointment of all these officers in the president alone, without reference to the senate. Nothing could apparently be more incompatible with our institutions than such a government—a mere continuation of the Spanish-Franco administration, in which all powers, civil and military, legislative, executive and judicial, were in the intendant general representing the president, who occupied the place of kings.

In no territory organized under the ordinance of 1787 were these officers so considered. There was a complete incompatibility with our constitution and the spirit of our constitution—first, in the governmental establishment; secondly, in the appointment of the officers to administer it; thirdly, the departure from the model territorial regulations of the ordinance of 1787. Such a bill, so startling in its provisions and so novel in a republic of Anglo-Saxon origin, could not pass without opposition from that jealous republican party (34), which had just come into power, and come in on the cry of saving the constitution from extension by loose construction.

On the acquisition of Florida sixteen years later the same course was pursued. The Louisiana act of October, 1803, was copied for Florida in March, 1819. That act

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[34] Mr. James Elliott, of Vermont (Republican), seconded the motion of Mr. Griswold, saying: "He would never consent to delegate, for a single moment, such extensive powers to the president, even over a territory; such a delegation of power was unconstitutional." Mr. Dana, of Connecticut (Federal), expressed himself thus: "The president may, under this authority, establish the whole code of Spanish laws, however contrary to our own, appoint whomsoever he pleases as governors and judges, and remove them according to his pleasure; thus uniting in himself all power—legislative, judicial and executive."

The reply to these objections reminded the objectors that this was a territory—not a state; and that the constitution had nothing to do with it. Thus, Mr. Rodney, of Delaware (Republican): "There is a wide distinction between states and territories, and the constitution appears clearly to indicate it. In the territories of the United States, under the ordinance of congress, the governor and judges have a right to make laws. Could this be done in a state? I presume not. It shows that congress have a power in the territories which they cannot exercise in the states, and that the limitations of power, found in the constitution, are applicable to states and not to territories." Benton's Ex. Dred Scott Dec., p. 56.

was approved by President Monroe, without a dissenting voice from any member of his cabinet (35).

It is clear from this action by two presidents and three congresses that no opinion was entertained that the benign provisions of the national constitution had any force or efficacy in the territories (36).

§ 158. Effect of change of government on political and private law and civil rights. It is a general rule of public law, recognized and acted upon by the United States, throughout all periods, that whenever political jurisdiction and legislative power over any territory, or the allegiance of its inhabitants, are transferred from one nation or sovereign to another, that the society itself is not disbanded or disorganized, nor are the municipal laws of the community—that is, laws which are intended for the protection of private rights as between individuals—abrogated by the change of sovereignty (37). By the

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35 It was a strongly southern cabinet. Benton says: "General Jackson, the governor, took care that power should be no 'barren sceptre' in his hands." Ex Dred Scott Dec., p. 72.

36 The liberty of our *subjects* must from now on rest on the *inherent* limitation mentioned in the Insular Tariff cases.

37 Downs v. Bidwell, 182 U. S. 244. This is the ground upon which Justice Chase holds that the state of Texas was not dissolved by the act of secession and the creation of an unlawful government. "It is not difficult to see that in all these senses the primary conception (of the state) is that the people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitute the state.

"This is undoubtedly the fundamental idea upon which the republican institutions of our country are established. It was stated very clearly by an eminent judge (Mr. Justice Patterson, in Penhallow v. Doane's Adm'rs, 3 Dall. 93) in one of the earliest cases adjudicated by this court, and we are not aware of anything in any subsequent decision of a different tenor." "Our conclusion, therefore, is, that Texas continued to be a state of the Union, notwithstanding the transactions to

change, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment (38).

All laws, ordinances and regulations in conflict with the political character, institutions and constitution of the new government are abrogated unless expressly continued in force.

Upon the cession of foreign territory to the United States the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to laws affecting private rights, the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered and repealed (39).

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which we have referred—the abdication of the government and the treason of the citizens." Texas v. White, 7 Wall. 700, 726. These acts being void were of no effect, and so long as the United States was endeavoring to guarantee a republican form of government, it could not admit that the state was dissolved.

38 U. S. v. Percheman, 7 Pet. 87.

39 Chicago & Pac. Ry. Co. McGlinn, 114 U. S. 546, 547. See also American Ins. Co. v. Canter. 1 Pet. 542; Halleck, Int. Law, ch. 34, sec. 14.

§ 159. Civil rights secure. Political rights there are none. The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this dominion the People are represented by the government of the United States, to the several departments of which all the powers of government over that subject are necessarily entrusted, subject, of course, to such restrictions as are expressed in the constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it must be admitted in respect to this, as in every power of society over its members, that it is not absolute and unlimited. In ordaining governments for territories, all the discretion which belongs to legislative power is vested in congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the government over a particular territory, and the qualifications of those who shall administer it (40).

The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, state and national. This doctrine was fully and forcibly declared by the chief justice delivering the opinion of the court in National Bank v. County of Yankton (41).

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40 Id. Insular Tariff cases.

41 101 U. S. 129; Murphy v. Ramsay, 114 U. S. 44. See also American Ins. Co. v. Canter, 1 Pet. 511; United States v. Gratiot, 14 Pet. 526; Cross v. Harrison, 16 How. 164; Dred Scott v. Sanford, 19 How. 393.

§ 160. Colonial dependency may be continued. No territorial government need be erected. The government exercises sovereign power over the territorial possessions except as restricted by treaty provisions and limitations universal in their application, of which there are several.

It is not incumbent upon the United States to establish a territorial form of government, but congress may provide for the government of the territory in such manner as it deems best subject to such limitations as those spoken of.

The United States has been in possession of and has exercised such sovereignty over a large extent of country, either unoccupied or occupied only by native tribes, with whom were mingled a few white settlers (43).

§ 161. Effect of admission of a state on private titles to land in the territory. "In a debate in the senate in June, 1850, on the act for the admission of California, a motion to amend the act by requiring California, before her admission, to pass in convention an ordinance providing, among other things, 'that she relinquishes all title or claim to tax, dispose of, or in any way to interfere with the primary disposal by the United States of the public domain within her limits,' was opposed by Mr. Douglas and Mr. Webster as unnecessary, and was defeated by a vote of thirty-six to nineteen. In the course of the debate, Mr. Douglas referred to the provision of the constitution authorizing congress 'to dispose of and make all needful rules and regulations concerning the ter-

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43 First Nat. Bank v. Yankton Co., 101 U. S. 129; In re Lane, 135 U. S. 443. Langford v. Monteith, 102 U. S. 145. See also Mormon Church v. United States, 136 U. S. 1; Ex parte Bollman, 4 Cranch, 75.

ritory or other property of the United States,' and said: 'This provision authorizes the United States to be and become a land-owner, and prescribes the mode in which the lands may be disposed of and the title conveyed to the purchaser. Congress is to make the needful rules and regulations upon this subject. The title of the United States can be divested by no other power, by no other means, in no other mode, than that which congress shall sanction and prescribe. It cannot be done by the action of the people or legislature of a territory or state.' He supported this conclusion by a review of all the acts of congress under which states had theretofore been admitted. Mr. Webster said that these precedents demonstrated that 'the general idea has been, in the creation of a state, that its admission as a state has no effect at all on the property of the United States lying within its limits,' and that it was settled by the judgment of this court in Pollard v. Hagan (44) 'that the authority of the United States does so far extend as by force of itself, proprio vigore, to exempt the public lands from taxation, when new states are created in the territory in which the lands lie' " (45).

§ 162. The partition of jurisdiction by admission. Upon the admission of a state into the Union, the state

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[44] 3 How. 212, 224.

[45] Van Brocklin v. Tennessee, 117 U. S. 164, 165. See also Cong. Globe, 31st Cong., 1st sess., vol. 21, p. 1314; vol. 22, p. 848, and secs. 960, 989, 1004; 5 Webster's Works, 395, 396, 405. In Gibson v. Chouteau, 13 Wall. 92, 99, Mr. Justice Field, delivering the judgment of this court, said: "With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations." Thompson v. Utah, 170 U. S. 343.

doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title to lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the state and not in the United States (46).

§ 163. **Effect of transfer of title on permanent immovable structures.** Where the inhabitants or residents of a domain belonging to a nation erect buildings and structures of a permanent character upon soil to which they have no title, such structures become a part of the land and pass with the deed of cession, unless there is some reservation in the treaty with the ceding country. In the same manner all permanent forts and appurtenances thereto pass with the ground of the territory (47).

§ 164. **Status of Indian tribes.** "From the beginning of the government to the present time, they (48) have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' they and their country 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of

[46] Van Brocklin v. Tennessee, 117 U. S. 167. See also New Orleans v. United States, 10 How. 662, 737; Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Doe v. Beebe, 13 How. 25; Barney v. Keokuk, 94 U. S. 324; Ill. Cent. Ry. v. Ill., 146 U. S. 384.

[47] Kincaid v. United States, 150 U. S. 483.

[48] Cherokee Nation v. Ga., 5 Pet. 1.

our territory and an act of hostility.' The treaties and laws of the United States contemplate such territory as completely separated from the states, and the Cherokee nations as a distinct community, and that 'in the executive, legislative and judicial branches of our government we have submitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community' (49).

"The soil and the people within these limits are under the political control of the government of the United States. They were and always have been regarded as having a semi-independent position when they preserved their tribal relations, not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate, dependent people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they reside" (50).

§ 165. Mineral lands. Acquisition and disposition by the government. The English law holding that the right to all mines was in the Crown has little bearing upon the policy of the United States in relation to its mineral lands.

Upon the same principle that a title once possessed by the general government, can be divested only by the

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[49] Worcester v. Ga., 6 Pet. 515. See note in 8 Lawyers Co-operative Ed. 483.

[50] U. S. v. Koagama, 118 U. S. 375. Cherokee Nation v. Kansas Ry., 135 U. S. 654. As to the authority of the states, Jackson v. Goodall, 20 John. 187.

grant of that government (51), it follows that the title to mineral lands can only be obtained from it under the provisions of acts of congress in relation thereto.

"No title from the United States to land known at the time of the sale to be valuable for its minerals of gold, silver, cinnabar or copper can be obtained under the pre-emption or homestead laws or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable.

"We therefore use the term 'known to be valuable at the time of sale,' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued" (52).

If the provisions of the law are violated patents may be vacated (53). The privilege of purchase is restricted to citizens or those declaring intentions to become such, but an alien can acquire and transmit title to a citizen (54).

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51 Wilson's Works, 496-98; Jackson v. Frost, 5 Cow. 346; 3 Kent, Com. *378.

52 Deffeback v. Hawke, 115 U. S. 392. See also Col. C. & I. Co. v. United States, 123 U. S. 307; Davis v. Weibbold, 139 U. S. 507.

53 U. S. v. Culver, 52 Fed. 81.

54 North N. M. Co. v. Orient, 6 Sawyer, 299. A corporation may take, but where incorporation would amount to an evasion the courts

§ 166. Colonial possessions. Ancient policy and practice. The power and right to acquire and hold dependent territory has never been officially denied and has been frequently declared and exercised (55).

The policy of such a proceeding must always remain an open question to be determined by the exigencies of cases as they arise. General policies have been declared by administrations in most dogmatic form, but in most instances the act has been contrary to the word (56).

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may go behind the fiction of corporate citizenship. See McKinley v. Wheeler, 130 U. S. 630; Manuel v. Wulf, 152 U. S. 505.

[55] For example, see Endleman v. U. S., 86 Fed. 456, and the Insular Tariff Cases.

[56] *Jefferson's example.* Jefferson decried the policy of having dependent colonies, but he EXCEPTED Cuba, advocating its acquisition so soon as it could be done without dishonor. He said if it was to be sold, the United States had the *pre-emption right* of purchase; if it is to be conquered, we, the conqueror. But all this open and above board—no pretext, wars, no false claims, no fictitious quarrels, no annoying, no bullying, no forced sale. Jefferson's Letter, quoted in Benton's examination of the Dred Scott case, pp. 24, 25, note. Notwithstanding the protestation against a desire or intention to expand, the United States has never declined to acquire territory. Senator Benton paints the picture quite graphically. "Arizona has been acquired: fifty millions were offered to Mexico for her northern half, to include Monterey and Saltillo; a vast sum is now offered for Sonora and Sinaloa, down to Guaymas; Tehuantepec, Nicaragua, Panama, Darien, the Spanish part of San Domingo, Cuba, with islands on both sides of the tropical continent. Nor do we stop at the two Americas, their coasts and islands, extensive as they are; but circumvolving the terraqueous globe, we look wistfully at the Sandwich Islands, and on some gem in the Polynesian group, and plunging to the antipodes, pounce down upon Formosa in the Chinese sea. Such were the schemes of the last administration, and must continue, if its policy should continue. Over all these provinces, isthmuses, islands and ports, now free, our constitution must spread (if we acquire them, and the decision of the supreme court stands), overriding and overruling all anti-slavery in its place beyond the power of congress or the people there to prevent it." (1857). Benton's Ex. Dred Scott Dec., p. 29. Justice White refers to the attempt under Pierce's administration in 1854. Downs v. Bidwell, 182 U. S. at p. 300.

Modern doctrine and decision. The law is settled that the United States holds the conquered and ceded countries as dependent appurtenant property (57).

INSULAR POSSESSIONS, TERRITORIAL AND COLONIAL.

The prophetic schemes spoken of by Senator Benton have been completely realized.

Hawaii was annexed in 1898, and a territorial government for those islands was established by an Act of Congress approved April 30, 1900. Porto Rico is another of our insular posessions, upon whom territorial government has been bestowed. The island was acquired first by conquest, and finally by the treaty with Spain. The Act approving civil government received the assent of the President April 12, 1900. Territorial government exists in these islands.

The Philippine Islands, also acquired from Spain, have not as yet been granted the privilege of local self government, but are governed under Acts of Congress by a Governor and Commissioners appointed by the President. Guam, another island, was ceded by Spain by the treaty of Paris, December, 1898. Tutuila, an island of the Samoan group, was recognized by a treaty with Great Britain and Germany in 1899 as a possession of the United States. Furnishing one of the finest harbors in the world, it constitutes a valuable and important possession of the United States.

Wake, and several other small islands in the direct route from Hawaii to Hong Kong, were taken possession

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[57] The Insular Tariff Cases, especially Downs v. Bidwell, 182 U. S. 244. Compare opinions of Justice White and Harlan. See for analogies 1 Cooley's Blackstone, 4th ed.* 107 and Notes.

of in behalf of the United States by Commander Taussig, January 1899. The Panama Zone should be regarded more in the light of a piece of property because the ownership and the government are in the one person, the United States.

The question of the right of the United States to extend its boundaries and to acquire and govern foreign territory has ever been a question of dispute. The right to acquire adjacent territory was settled under an administration espousing the most strict construction of the Constitution, and action was taken, as we have seen, without resorting to an amendment to the Constitution. When the first disconnected territory was acquired by the purchase of Alaska, the influence of the strict constructionists was at its lowest ebb, and no question was made. As to the foundation of right and the policy of acquiring and maintaining insular possessions, to be held as Colonies, we have strangely enough the views of Jefferson, decrying the policy as to distant possessions, but advocating the acquisition of Cuba, so soon as that might be done without dishonor. It would seem that in view of the easy means of communication with all parts of the world, any argument which would justify the seizing of disconnected territory in one part of the world would at the present time justify it in any other part. There is, however, another view to to be taken as a political view, and that is that there is not always a choice, for any nation which recognizes its moral obligation as one of the brotherhood of nations may be forced by the inextricable logic of circumstances to take what it originally

had no intention of acquiring, and having acquired, to assume all the burdens and obligations incident to such acquisition and required by the political ethics of modern civilization.

CHAPTER XI.

THE SOURCES AND SYSTEMS OF LAW.

§ 167. **A government of law.** In noticing the development of American jurisprudence and the establishment of the American constitution, occasion has been taken to emphasize the principle, often repeated, that in America is established a government of laws and not of men (1).

What is intended in American jurisprudence by the constant repetition of this form of expression "a government of laws, not of men?"

Probably as good an answer to the inquiry as can be made is that although all law emanates from the people, it is the will of the people that their public affairs as well as the rights and interests of individuals shall be guided, controlled and moulded in accordance with the doctrines, principles and rules made the basis of the system of law established by them, or in other words there is a law unto lawgivers, the constitution is the supreme law.

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1 Marshall says: "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. * * * It behooves us then to inquire whether there be in its [the government's] composition any ingredient which shall exempt it [the government] from legal investigation, or exclude the injured party from legal redress." Marbury v. Madison, 1 Cranch, 137.

The government is not supreme. It has been well said that "as a state has claimed precedence to the people, so in the same inverted course of things, the government has often claimed precedence of the state. The ministers, dignified very properly by the appellation of magistrates, have wished, and succeeded in their wish, to be considered as the rulers of the state" (2).

The individuals who occupy the positions of trust designated as public officers in every case exercise merely an agency or a trust. All of their acts are in the name of the law. "The law commands," or "in the name of this commonwealth, I demand," is the language of the official, and the warrant for his action must be in every case the law.

§ 168. The sources of law. It is frequently said that it is the province of the legislative department of government to make the law, the judiciary to expound it, and the executive to carry it into effect; and, in the outward manifestation of this separation of the powers of government, the actual fact that the legislative department is not the only law-making power is frequently lost sight of.

As it has been frequently shown that the parliament of England is not the only law-making power of England, and that, as a matter of fact, the largest body of English law is not statutory law (3), so it may be shown that a great portion of our law does not emanate from the legislative department, and that in fact changes of the law take place in which the legislature has no hand.

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2 Chisholm v. Georgia, 2 Dall. 455.

3 1 Wilson's Works, p. 171 et seq.

§ 169. The supreme law of the land. Article VI, section 2, of the United States constitution says: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In this section of the constitution it will be seen that a most important body of laws which control and affect the rights of the nation, the state and the individual emanate from sources other than the legislative department, either of the Union or of the states.

The United States was the first among the governments to provide that treaties duly entered into were a part of the supreme law of the land (4).

This provision was undoubtedly inserted because of the existence of thirteen separate jurisdictions, each having and exercising governmental powers.

§ 170. Legislative branch may be obliged to act. It is well understood that there may be secret articles in a treaty which it is not wise to make public, and of a character which only a legislative power can carry out. It follows that a treaty stipulation for anything of this nature is to be given effect by legislative authority, and the legislature is authorized, and under public obligation, to give effect to the treaty (5).

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[4] Ware v. Hylton, 3 Dall. 199.

[5] Id.

A treaty may divest rights which have accrued under an existing law, and the nation may be obliged to give effect to this treaty divesting the individual rights (6). The recent proposed California anti-alien laws which caused the President to interfere illustrate this principle.

§ 171. **The Common Law.** The Common Law is a term which has, with us, a double significance. In the United States, when we speak of the common law, the mind of the lawyer naturally reverts to the system of English jurisprudence, an indefinite and undescribed portion of which was said to be the birthright of the colonists (7), and has been expressly adopted in most of the states as a portion of our jurisprudence. By the common law a great many of our most important transactions are governed.

In view of the common law every statute enacted by a state legislature is construed, and every statute is said to be either in derogation of the common law or declaratory of it, unless the subject is one that was uncertain at common law. The common law, when predicated of the English system by an Englishman, has a meaning somewhat different from that just spoken of. In that connection it would have the same meaning in any country.

The common law of England meant all of those universal rules, not the enactment of parliament, which governed the English people.

Long established usages or customs, especially the cus-

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[6] United States v. Schooner Peggy, 1 Cranch, 103. See also Tennessee v. Davis, 100 U. S. 266; Martin v. Hunter, 1 Wheat, 373.

[7] I Wilson's Works, p. 170.

tom of merchants, became a part of the common law, and so after the Conquest, and during the period of the struggle for English liberty, there is a constant insistence upon the ancient customs of the realm.

A statute of 25 Henry VIII., chapter 21, section 1, declared that "this realm is free from subjection to any man's laws, but only to such as have been devised, made and obtained within this realm, for the wealth of the same, or to such as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, with their own consent to be used amongst them and have bound themselves by long usage and custom" (8).

If, however, we reflect upon this subject and consider carefully the facts and conditions, it becomes apparent the term "common law" is one of great indefiniteness, meaning one thing in one context and another thing in a different connection. The common law of England had and still has the two great branches, one relating to political relations or the constitution and the other to private affairs. Of the former, most if not all of the great fundamental rules and principles are embodied in our constitution and prized as a sacred part of our liberty. The common law of England governing property and private affairs was in a very crude and developing state —the commercial law just beginning to take form under the masterful hand of Holt and his successor, the great

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8 "Custom: a species of legislation by the people themselves which in this country and England is the foundation of the common law itself, or, in other words, *general customs* obtaining by common consent." Gibson, J., in Lyle v. Richards, 9 S. & R. 323-39.

Mansfield. The law of land was so closely interwoven with the political institution of sovereignty as to be wholly unsuited to our condition except in the branch wherein all systems must closely resemble each other, viz., the rules of conveyancing or the acquisition of title involving rules of interpretation. If the subjects treated by Blackstone are examined in detail it will be found that but a small portion of the book survives in our law. This may be summarized as follows:

Volume I. The part devoted to the organization of the state is inapplicable. A body of rules limiting the sovereignty and securing personal liberty was found to be applicable notwithstanding the change in form of government. This portion is of priceless value.

Volume II. The law of ancient and modern tenure is wholly obsolete. The treatment of commercial law involving contracts is so brief as to be almost useless except as showing how crude and undeveloped the law was at that time.

Domestic relations have been subject to sweeping changes.

Volume III. This book is composed of the law of actions or procedure and still has more than mere antiquarian value, but its matter is almost wholly obsolete.

Vol. IV treats of the crude, cruel and obsolete law relating to crimes and aside from its definitions has little in it which remains. From this it will be seen how little of this common law is either valuable or applicable to our conditions, and yet lawyers and judges still talk about the common law as though it were the base line of our system.

§ 172. **Unwritten or customary law.** The dignity and importance of customs was made apparent when we mentioned that the constitution of one of the states, Connecticut, for many years after the adoption of the federal constitution was merely the customs of the people (9).

The common law is said to be an unwritten law. It was classed by Blackstone as the lex non scripta, and by him said to include not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom, and likewise those particular laws that are by custom observed in certain districts (10).

One need but turn to the examination of the common law given by the learned commentator to appreciate that

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9 Calder v. Bull, 3 Dall. 386.

10 1 Cooley's Blackstone (4th ed.), 63. General and particular customs must be distinguished. Judge Story says: "Those usages which, from their general prevalence and long-continued recognition among merchants, have been received and incorporated into the law as the custom of merchants, must not be confounded with the particular usages of trade. The custom of merchants is applied to that collection of rules and principles of law which the courts received originally from the merchants, but of which they now take notice judicially, and which are binding throughout the realm. These customs, having been judicially established, are no longer in the power of the merchants, and can no more be altered or superseded by the acts or agreements of parties than the other rules of law. But wherever, in any course of business, a particular usage obtains, which is general, uniform, notorious, reasonable, and consistent with the rules of law, such usage will be presumed to have entered into the contemplation of all parties contracting in reference to the subject matter as to which it prevails unless the contrary is shown. This principle, although most frequently applied in mercantile transactions, is not restricted to them, but extends to contracts in all departments of business, mechanical, agricultural and professional, upon the principle that, wherever the knowledge of any usage or custom is necessary to the right understanding of an agreement, it would be unreasonable to deny to the reader the right enjoyed by the writer." Rogers v. Mech. Ins. Co., 1 Story (U. S. Ct.), 608.

by far the largest portion in bulk of the English law consisted in this unwritten or common law of the realm (11).

The evidence of the unwritten law may sometimes, in the first instance, be obtained by the testimony of witnesses, or, as was formerly the case, by the examination of the merchants of a particular locality or guild (12).

The final evidence, however, of the common law, which can be said of all the law, is mainly to be found in the decisions of the courts of England, or the particular country of which the common law is said to be a part.

Those decisions, for the first time adopting and announcing a rule, were said to be a species of judicial legislation, but they are distinguished from those judicial edicts which change established rules (13).

Thus, Spence says, in his Equitable Jurisprudence, the "jus civile is distinguished from jus praetorium, which, in Bracton's sense, is the law formed by the decisions of the judges. This jus praetorium has been continually enlarged by the common-law judges, so as to form a very considerable portion of the common law of England" (14).

§ 173. Development of the Common Law. The manner in which the common law has developed is simple and easily understood. Take, for example, a case arising for the first time in a jurisdiction. In the absence of precedent, reason and justice are said to be the sole spirit of

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11 1 Cooley (4th ed.), 67, 68 and notes.

12 Whitehead v. Walker, 9 M. & W. 514; Renner v. Bank, 9 Wheat. 582.

13 See post, Judge-made Law.

14 Eq. Juris., *124.

the law, and in all civil actions between individuals in reference to property rights and injuries, some decision must be reached.

The reason and justice of the thing is frequently the sole guide of the court.

In a comparatively recent case the New York court of appeals was called upon to determine the right of the owner of logs which had been cast by a flood upon the land of a lower proprietor of the soil, bordering upon the stream. In seeking for the reason and justice of the matter, resort was had to other systems of law; and in this case the source resorted to was the civil law, and the rule of the civil law was expressly adopted by quoting, as their controlling reason and rule, the language of the civil law, as expressed by Domat (16).

We have before referred to a similar instance in reference to the law of bailments. In this case, not simply a single rule or a single principle was adopted, but one may truly say that the whole English law of bailments was framed and formulated by the adoption of the Roman law by the judge deciding the case (17).

§ 174. Judge-made law. Very frequently the expression "judge-made law" is used in condemnation of all utterances from the bench recognizing and applying rules of law which have never before been announced in the jurisdiction within which the court is sitting.

Sufficient has been said in reference to the common law and the law merchant to indicate that there is a field of

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16 Sheldon v. Sherman, 42 N. Y. 484; 1 Am. Rep. 569.

17 Lord Holt in Coggs v. Bernard, Ld. Raym., 909; 1 Sm. L. C. 369.

judicial reasoning and a function of the judiciary to give sanction in specific cases to the rules of reason and universal customs which obtain among men.

In that sense, and within the limits indicated, judge-made law is not only justifiable, but is the imperative duty of the court.

An eminent member of the New York bar very truly says: "Especially is this so under our Anglo-American system of common law. The law is what the court of last resort declares it to be. What the court declares the law to be is frequently determined by the reasoning of counsel. This is particularly the case where a novel question is presented—what we call a case of 'first impression.'" He says: "Of course the legislature does exercise its law-making powers from time to time, but generally in a way to make us thankful that it does not exercise these powers more frequently" (18).

Most of the judicial utterances in the domain of the common law, embracing the law merchant, maritime and admiralty law and equity, would fall within the condemnation of judge-made law were there no distinction made between what is properly termed judge-made law and the application of the rules of reason and justice to cases which must continually be submitted to the courts for their decision.

§ 175. Improper judicial legislation. When by this process of judicial reasoning rules of conduct have been once thoroughly established in the jurisprudence of a

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18 Address of Hon. Wm. L. Hornblower. See also Loeb v. Trustees, Fed. 43.

state or a nation, the function of the judiciary is performed, and these rules become a part of the law of the land. Other cases, arising after such rules are so established, are not new cases or cases of novel impression. Especially is this the case where the question involved is a question of property rights or a question of general importance, like a question of commercial law, rules of damages, liabilities of master and servant, liabilities of carriers, and the like (19).

The true rule has frequently been announced. Thus, Judge Cooley says: "When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, unless for very urgent reasons and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law" (20). "A precedent flatly unreasonable and unjust may be followed if it has been for a long period acquiesced in, or if it has become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by overruling it. In such a case it will be proper to leave the correction of the error to the legislature, which can so shape its action as to make it prospective only, and thus prevent the

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[19] It will be observed that the federal judges speak of rules of "general law" where one would ordinarily say common law.

[20] 1 Cooley's Blk. 69, note 4, citing 1 Kent, 475. See Nelson v. Allen, 1 Yerg. 376; Emerson v. Atwater, 7 Mich. 12; Sparrow v. Kingman, 1 N. Y. 260; Palmer v. Lawrence 5 N. Y. 389; Boon v. Bowers, 30 Miss. 246.

injurious consequences that must follow from judicially declaring the previous decision unfounded" (21).

Illustration: Priestly v. Fowler (22). In 1837 the English court deduced the rule, based upon public policy, that where fellow-servants were habitually working together, there should be no recovery for an injury by one servant to the other, when the proximate cause of the injury was the negligence of the fellow-servant. In this manner originated the fellow-servant doctrine, with its many refinements and exceptions.

When the court was called upon to hear and determine this case they had no precedent to guide them, and in that case they very properly formulated the rule which seemed most reasonable and just.

The rule of comparative negligence was adopted for the first time in Illinois many years ago (23), and the rule was very frequently applied during a long series of years (24), and became the settled rule of law.

Notwithstanding it is within the province of the courts of Illinois to recommend legislation to the general assembly, and indicate wherein the law might be improved by change, the court of Illinois finally announced its intention to change this long established rule (25).

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21 Emerson v. Atwater, 7 Mich. 12; Pratt v. Brown, 3 Wis. 603; Day v. Munson, 14 Ohio St. 488; Taylor v. French, 19 Vt. 49; Bellows v. Parsons, 13 N. H. 256; Hannel v. Smith, 15 Ohio, 134; Sparrow v. Kingman, 1 N. Y. 260; Ram on Legal Judgment, ch. 14; 7 Robinson's Practice 1 et seq.

22 3 Mees. & W. 1.

23 G. & C. U. Ry. Co. v. Jacobs, 20 Ill. 478.

24 C., B. & Q. Ry. Co. v. Hazzard, 26 Ill. 373; C. & A. R. R. v. Gretzner, 46 Ill. 75; C., B. & Q. Ry. Co. v. Johnson, 103 Ill. 512; W. S. Elev. Ry. Co. v. Stickney, 150 Ill. 362.

25 City of Lanark v. Dougherty, 153 Ill. 163.

The rule involved in these Illinois cases is not a rule of property, but it was long established and there were no changed conditions—it was simply judicial legislation.

The attainment of uniformity is a sufficient basis of policy to justify a change in a rule long established in a given state but not in harmony with the prevailing rule (26).

§ 176. The rule Stare Decisis. Stare Decisis in plain terms means that where the courts have recognized a rule and have followed it, other judges will in similar cases and under like conditions apply the same rule.

This is a technical name for a much abused but very necessary and salutary rule. If there is to be a body of law recognized by the courts and given expression, either in the reports of the decisions or the writings of jurists, which in this respect must necessarily be based partly upon the law as expressed in the decisions of the courts, it is necessary, in order that the rules shall be given the character of a fixed law, that the rules announced by the highest judicial tribunals in the land shall have stability and be respected unless some good reason is shown for making a change. A little reflection makes it plain that the principle of "Due Process of Law" traces to the same origin, for this in its simplest form of expression is that the treatment of each man's case shall conform to a general rule, not only as to its substantive law, but as to its

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[26] e. g. The equity doctrine of tracing trust funds. Nonotuck Silk Co. v. Flanders, 85 Wis. 237; Crandall v. Woodhouse, 197 Ill. 104, 58 L. R. A. 385. Constitutional construction of a statute to conform to the construction by the federal court, Peo. v. O'Brain, 176 N. Y. 263. See also Commercial Bank v. Davis, 115 N. C. 226.

procedure, and these again trace back to the great principle of equality whereby the law does not consider the man but the nature of the acts and rights drawn into controversy before the judicial tribunals.

It is well understood that the principles and rules of the common law, as well as the construction of constitutions and statutes, are worked out by elaborate processes, in the decisions by the courts of cases as they arise, and in time a decision appears which satisfies the judicial and the popular sense as to what is the just and proper rule under the circumstances. This sets at rest for the time being the law on the subject. The decision may not be the first decision which has been made in the jurisdiction (though it may be), for it is only when such a condition is reached that the decision receives general acquiescence in the jurisdiction that the rule can be termed established. The cases so establishing rules are termed the leading cases.

§ 176a. Law must keep pace with the conditions of trade and society. There is, however, scarcely a decision which can more than temporarily set at rest the law. The ever changing conditions of society, trade, and invention give rise to new situations and new questions. Old rules by this process are constantly becoming obsolete, because the tide of human activity must often bring a rule out from under its application, and controversies over new transactions invoke a new contest, until finally another decision differing somewhat from the former rule obtains general approval.

Such a decision is termed a ruling case to distinguish it from the superseded leading one. Every leading case

is during the time when its authority is respected a ruling one, and it continues a ruling case so long as the principle upon which it is based and the rules of law which it announces are regarded as the law of the subject. The multiplication of decisions emanating from our courts almost invariably follow along the line of the leading and ruling cases with slight modification until a new rule breaks up the authority of the former one, and then the trial courts and the tribunals inferior to the supreme judicial tribunal bow to the authority.

When a leading case or old case is supplanted by a later case, which announces and enforces a rule contrary to that declared in the earlier case, the former case is then denominated an overruled case. Many of our leading cases are overruled by later decisions.

This respect for judicial decisions, while essential to the existence and observance of fixed rules, has been carried to absurd lengths in its application. We may perceive by slight reflection how perilous is the experiment of relying upon mere precedent without in every instance examining the ground of the precedent and the elemental facts of the new case presented for decision in order to determine whether the facts present a case within the principle of the former case or, in extreme cases, whether the former case was determined on principle.

The most dangerous form of logical reasoning is invoked, viz., analogy. The safe application requires unchanged principles, unchanged policies, unchanged conditions of society or trade, and undistinguishable elemental facts involved in both the precedent and the case

at bar. All these existing, stare decisis works for uniformity and equal protection of law. But the world moves. As Wendell Phillips observes, "Nature's live growths crowd out and rive dead matter. Ideas strangle statutes." And Lord Coke says: "The principles of natural right are perfect and immutable, but the condition of human law is ever changing, and there is nothing in it which can stand forever; human laws are born, live, and die." Precedents bend to principles and rules depend not so much on precedent as on principles.

A new epoch in the law has been reached. We still look for precedent, but we go further and look for the ground upon which the cases were adjudged. Only about a decade ago Mr. Justice Holmes remarked: "We are only at the beginning of a philosophical reaction, of a reconsideration of the worth of doctrines which, for the most part, still are taken for granted without any deliberate, conscious and systematic questioning of their grounds."

In 1895, Austin Abbott said, "By actual law, we mean the law in force today, the law now applicable to transaction, and now controlling procedure. Time was when the earliest precedent was of paramount authority; later decisions were tested by the earlier, and disregarded when found to depart from the earlier. By an almost imperceptible process this rule has been reversed. It is now the latest decision of the court of last resort which is regarded as the highest evidence of the law; and earlier decisions are valued chiefly as they throw light upon the intent and effect of the later. It is, therefore, actual law which is now of the first importance, and historic law owes

its main value to the better understanding it gives us of the law of today. Beyond this it has little more than the intellectual interests which all parts of the history of our race afford."

It is the case in point which constitutes a precedent,— in point in principle, and in point in the presence of all the elemental facts of the one at bar, and the absence of any other material fact. Too little attention is now being paid to what constitutes a case in point. Upon this point a statement of Lord Denman is of great value: "A case was brought before that court (the Exchequer), upon which it was proposed to overrule, not the dicta, the impressions, the fancies of the learned frequenters of Westminster Hall, but decided cases, running through a period of near fifty years, appearing in numerous reports, and laid down by all the text-writers. I believe Mr. Justice Bayley, on a particular examination of those cases, thought them clearly founded in error; they were traced to a dictum uttered by Lord Mansfield in his first judicial year, which dictum was held by Mr. Justice Bayley to be untenable; and my noble and learned friend pronounced the unanimous judgment of his court, denying the authority of these cases, and overruling them all. I speak of the case of Hutton v. Balme (2 You. & J. 101; 2 Cr. & J. 19; 2 Tyrr. 17; and on Error, 1 Cr. & M. 262; 2 Tyrr. 620; 3 Moo. & So. 1; 9 Bing. 471). . . . And I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn

out, and the first column headed, 'Law by Statute,' and the second, 'Law by Decision;' a third column, under the heading of 'Law Taken for Granted' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the cantilena of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle'' (26a).

The above, with the opinion of the court in a recent New York case, indicates clearly the test of a case in point. ''Certain expressions of learned judges, used arguendo, . . . are relied upon by counsel as establishing a principle that controls this case. Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision. 'General expressions,' as the great federal jurist once said, 'are to be taken in connection with the cases in which these expressions are used' '' (27).

§ 177. The law merchant. The names of Holt and Mansfield must always stand among those of the great jurists of the world. Their fame rests almost entirely

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26a Lord Denman in O'Connell v. The Queen, 11 Cl. & Fin. 369, 373.

27 Cohens v. Va., 6 Wheat. 264, 399; People ex rel. Met. St. Ry. Co. v. Tax Comrs., 174 N. Y. 417-447.

upon their labors in incorporating into the English common law the maritime or mercantile law of nations (28). Mansfield is justly entitled to the credit of the development of the modern common law of England, but Lord Holt's services should not be overlooked. A vast portion of the law merchant, as approved by Mansfield and by him made a part of the common law of England, is derived directly from the civil law. The whole current of authorities from all time establishes the doctrine that the custom of merchants has always been regarded as a part of the common law; but it was not until the time of Mansfield that the law merchant can be said to have exercised a great and controlling influence upon the jurisprudence of England.

The action of assumpsit. It is under the action of assumpsit that the modern law merchant has been incorporated into the common law. In the time of Edward III. we discover that, in the ordinary transactions amongst merchants, that is, members of the trading community, a distinct law prevailed, of a more liberal nature than the general law, and that it was more summarily and expeditiously exercised. This was called the lex mercatoria.

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[28] See a very valuable note on the law merchant in 1 Cranch, App. note a, *368.

Of Lord Holt, Smith says: "I have no hesitation in saying that Lord Holt alone accomplished more for English mercantile law than the whole body of the English judges prior to his elevation. The present law with regard to bills of lading seems to have originated with Lord Holt. See Evans v. Marlett, 1 Ld. Raymond, 261. Those who desire to estimate his powers of mind and mode of dealing with important legal questions will do well to peruse his celebrated judgment in Coggs v. Bernard, Lord Raymond, 909, in which, availing himself, of his acquaintance with the civil law, he settled the law relative to bailments on its present footing." Smith's Mercantile Law, p. 27.

It had, in all probability, silently prevailed in London and other commercial towns, in some shape, throughout the whole of the Anglo-Saxon times. By the statute 27 Edward III. (Stat. 2), in each town where the staple was ordained, a mayor was to be chosen, skilled in the law merchant, to do right to every man according to that law. The lex mercatoria is expressly mentioned by Fortesque. In common societies of merchants and in mutual contracts, says Selden, equity and good conscience, rather than strict law, is required; and he mentions a case in the time of Edward II., where, following up this principle, the defendant in an action of debt brought, secundum legem mercatoriam, for some corn sold, was not permitted to wage his law, though he might have done so in an ordinary action of debt. It would seem, too, that merchants had always been specially favored by having a more summary process in the king's court" (29).

The vast importance as a great instrument of law reform of this new use of the action of assumpsit by Mansfield may be made clearer by a simple statement. "In one word the gist of this action is that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money" (30).

Here then is justice and equity introduced where technicality had been the rule.

Mr. Justice Caton, in an opinion in the supreme court of Illinois, says of the common law, and its connection with the customary law and the law merchant: "Were

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[29] Spence's Eq. Juris., 247.

[30] 2 Burr. 1012.

we able to explore the past with certainty, we should probably find that every essential principle of the common law, before it was adopted by the decision of any court could be found in some precedent custom among the people, and which, by convenience and justice, so commended itself to the courts that they recognized and adopted it as a part of the law of the land (31). We are, however, able to thus trace to its source but little of the common law, except that which was adopted from the custom of merchants. That was so broad in its principles and so comprehensive in its objects, there was so much of it relating to one great subject, that it acquired a name to itself, and for dignity and importance struggled even with the great body of the common law; hence its name is remembered while its separate existence has ceased to be. Were we now to strike from the common law all it has borrowed from, and which once constituted a distinctive portion of, the law merchant, we should find it unfitted for the most rural districts of this country; for agriculture has become so intimately connected and associated

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31 "The mercantile law of England is, in point of fact, an edifice erected by the merchant, with comparatively little assistance either from the courts or the legislature. The latter have, in very many instances, only impressed with a judicial sanction, or deduced proper and reasonable consequences from, those regulations which the experience of the trader, whether borrowing from foreigners or inventing himself, had already adopted as the most convenient. When trade began to flourish in this country, those occupied about it soon discovered that the law had provided but few rules for the guidance of their transactions, and that it was, therefore, necessary that they should themselves adopt some regulations for their own government. Thus they, in early times, erected a sort of mercantile republic, the observance of whose code was insured less by the law of the land than by *force of opinion* and the dread of censure." Smith's Mercantile Law, pp. 29, 31.

with commerce that the rules which govern one must seriously affect the other. With all its avenues of intercommunication, commerce now extends itself to the granaries and pasture fields of the remotest frontiers. Thus dismembered, the common law would only be a fit code for the government of a fox-hunting gentry and their dependent serfs.

"While elementary writers and the judges of courts have been in the habit of speaking of the lex mercatoria distinctively, they have for a very long time spoken of it and treated it as a part of the common law." David Dudley Field says of the common law as it existed at the time of the American Revolution, that it was of two kinds—public and private. The public law was good. The private portion, that which related to land and private relations, was but little advanced beyond the region of semi-barbarism. Most of the good which it had, and of which it has since accumulated, was the contribution of the Romans, that magnificent people which once ruled the world by the sword, and have since held a half dominion by the silent empire of law (32).

§ 178. The maritime law. The maritime law, of which the law merchant constitutes a branch, is an essential part of the law of nations (33), but it is as much a part

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32 Am. Bar Ass'n Rept. (1889), p. 233.

33 Mr. Smith, in the introduction of his Mercantile Law, says: "In ascertaining the legal rights arising out of commercial transactions, it frequently becomes necessary to have recourse to the volumes of international law, frequently to the contemporaneous laws of nations. So far as it affects title to lands, it depends upon those feudal institutions from which the rules in our country governing such property originate. It is deducible in great part from the imperial code of Rome, in great part from the different maritime codes of ancient Europe; and

of the municipal law of England and of the United States as it was of the civil law of Rome, because its customs were a part of the customs of the English people (34). Lord Mansfield says: "The maritime law is not the law of a particular country, but the general law of nations. Non erit alia Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempora una eademque lex obtinebit" (35).

Theophilus Parsons, a noted legal author, and formerly Dane Professor of Law at Harvard University, in his treatise on Maritime Law, has given an excellent account of the rise of the law merchant and maritime law and its adoption in England and America. He makes very clear the principle that the law merchant, and particularly the maritime law, which governs the law of shipping, never has been, and never can be, strictly speaking, the municipal law of any country, but must ever remain in a sense jus gentium (36). Upon this question he says:

"In Molloy's work, de jure Maritimo et Navali, he says, B. 3, C. 7, S. 15: 'Merchandise is so universal and extensive, that it is in a manner impossible that the municipal

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all these, its components, while they are interspersed and qualified by a multiplicity of statutory enactments, are explained, blended and applied, and the cases for which they have omitted to provide are solved, by the decisions of our English courts of law and equity." See Personal Property. Smith's Mercantile Law, 18.

34 Hill v. Spear, 50 N. H. 253. 9 Am. Rep. 196. Story Conf. Law, § 242.

35 See 1 Wilson's Works, 337; 1 Blk. Com. 273.

36 The student has been told that municipal law means the general law of one particular country, e. g., England, the United States. Jus gentium is the Latin or Roman expression for a universal international law.

laws of any one realm should be sufficient for the ordering of affairs and traffic relating to merchants. The law concerning merchants is called the law merchant from its universal concern, whereof all nations do take special knowledge.' And the same idea is expressed in some of the cases from which we have already quoted, where it is said that the lex mercatoria is a part of the jus gentium. This doctrine is of great practical importance. If it had been more freely admitted in English jurisprudence, their law of shipping, especially in relation to liens, would have escaped some embarrassment and some uncertainty, much of which we are free from.

"This principle recommends itself so strongly, and equally on the grounds of justice and expediency, that its early and general recognition is not surprising. There is a remarkable passage in the Pandects, which we think bears strongly upon it. In the title Lege Rhodia de Jactu, to which we have already referred Dig. L. 14, tit. 2, Sec. 9, occurs what we should call a case stated to the Emperor Antonine, calling for a decision. The answer is, 'I, indeed, am lord of the world; but the law is (the lord) of the sea. Whatever the Rhodian law prescribes in the premises, let that be adjudged.' Here is precisely the distinction we would suggest. The imperial despotism of Rome, while asserting its absolute and universal sovereignty, acknowledges that the ancient code of the little island of Rhodes, because it had been sanctioned and established by long usage among all whose business is on the sea, must govern there. So, too, we find the later codes of Oleron, and Wisbuy, and the Consolato, for example made

not for one state or nation, but for all; and imposed upon them, not by authority of a sovereign right, but by the sanction of a sovereign custom'' (37).

Of the sources and development of this law there is some misapprehension. It is frequently stated that our commercial law and maritime law comes from the Romans, or from the civil law of Rome. This misapprehension comes about by the indiscriminate use of the term civil law, as though that term meant only the Roman law. The truth is that the sanction given to the Rhodian law, and the general rules and customs of merchants, by the Romans, at the time when they were supreme in the western world, is the only reason for ascribing the origin of the law merchant and maritime law to the Romans' civil law.

The law merchant developed very highly in the commercial European countries and it is to the codes of these countries that we look for the origin of the modern ideas of commercial law. England for many centuries was far behind the other countries in matters of commerce and of commercial law. Magna Charta indeed has clauses inserted for the protection of foreign merchants, and statutes were passed from time to time which indicated the recognition of a sort of a jus gentium; but in the later books of the law, Glanville, Fitzherbert, Brooke, Bracton, Fleta, Britton, and later still the books of Lord Coke,

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[37] Parson's Maritime Law, pp. 22, 23. By sanction of law is meant the power which gives it efficacy—in this context it *seems* to be consent but the technical idea is the punishment or penalty for non-observance—and in all times the penalty of public opinion or contempt for one who disregards has been regarded as one of the most powerful sanctions.

indicate scarcely more than the recognition of a law merchant or mercantile customs.

The list of maritime codes and commercial regulations from the time of the Rhodian law is a long one, but the point which it is important to observe is not the development of the maritime and mercantile law, but its introduction into the law of England. Lord Mansfield is generally given credit for this important improvement in the common law, and while he is entitled to the credit of establishing it more fully than ever before, and upon the lines which it has ever since taken, the name of Lord Holt should not be overlooked.

The manner in which Lord Mansfield accomplished his task is important to the modern student. Mansfield, whose surname was Murray, was a Scotchman, educated in the Scotch universities, where the civil law was the basis of instruction in jurisprudence, as was the civil law the basis of the laws in Scotland. Lord Mansfield treating the action of assumpsit as we have just seen as an equitable action, freely and without concealment drew from the rich storehouse of the civil law for his principles of equity and justice, and it may be as plainly and truthfully stated that by this invocation of the civil law as it had developed in Europe at his time, he transformed the crude code of the common law into something like the elegance of a modern system.

The student of American law can appreciate something of the vast contribution which the Scotch universities have made to the modern jurisprudence, in which we are particularly interested, when he recalls that Mansfield

touched the crude body of the common law with this magic wand of the civil law, and our own Wilson, with his vast knowledge of all of the ancient systems of the law, derived mainly by his studies at the same great seat of learning, was mainly instrumental in giving form and substance to our Constitution. In connection with the influence of the civil law, or rather this jus gentium which traces to the civil law, as developed in the civil law countries of Europe, the student need only be reminded of the observation of Chancellor Kent as to the manner in which he built up jurisprudence of New York, particularly on the equity side of the courts, and also to the account of the rise of equity as given by Spence in his equitable jurisprudence. Chancellor Kent says: "I made much use of the corpus juris and as the judges (Livingston excepted) knew nothing of French or Civil law, I had an immense advantage over them. I generally could put my brethren to rout and carry my point by my mysterious wand of French and civil law. The judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting alarm or jealousy, to make free use of such authorities and thereby enrich our commercial law" (38).

Perhaps this subject should not be passed without mentioning the name of another distinguished Harvard Professor and Justice of the Supreme Court, whose contributions to American jurisprudence through the use of the same sources of law can scarcely be overestimated. This allusion is of course to Mr. Justice Story, whose writings

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[38] Illinois State Bar Association Report, pp. 13-14.

and decisions may be said to have established the modern maritime law within the United States.

It is observable that the law merchant and the maritime law are not generally distinguished from each other, but are frequently used indiscriminately. The only real difference is in the sanction—when viewed as a part of the municipal law the rules are the law merchant, when regarded from the standpoint of international law the same rules are the law maritime. Mr. Justice Story applies the same principle to a commercial case (39) brought upon a negotiable instrument, observing: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyle (2 Burr. R. 883-887), to be in a great measure not the law of a single country only, but of the commercial world."

In this case, notwithstanding the thirty-fourth section of the judiciary act, which provides that the laws of the several states, except where the constitution, treaties or statutes shall otherwise provide, shall be regarded as rules of decision, binding upon the federal courts, and the highest court of the state of New York had established a rule upon the question, the federal court decided contrary to that rule, upon the broad principle of commercial or maritime law indicated.

Upon the same principle the same court, in a still later case upon the subject of insurance, held that the federal court was bound by the general commercial law, independent of the law of any particular state; the Court, in its opinion in that case, remarked:

[39] Swift v. Tyson, 16 Pet. 19.

"The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy, or customs.

"Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to a great respect, they cannot conclude the judgment of this court.

"On the contrary we are bound to interpret this instrument according to our opinion of its true intent and object, aided by all the lights which can be obtained from all external sources whatsoever, and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment" (40).

The United States courts have uniformly adhered to this position (41).

The anomalous result is that the different parties to the same series of commercial paper or a commercial transaction may have different rights and liabilities in reference thereto, according to the law of the land, depending upon the place of residence of the parties and not upon the contract or agreement. Some of the states have adopted the policy of the decisions of the federal court in such matters (42).

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40 Carpenter v. Providence-Washington Ins. Co., 16 Pet. 494-511.

41 Railway Co. v. National Bank, 102 U. S. 14.

42 Trehon v. Brown, 14 Ohio, 486. As early as 1823 Mr. Dane said: "A serious evil we are fast running into in most of our states. This inundation of books made in different states and nations will increase until we can shake off more of our local notions. Our true course is

§ 179. Express adoption of the common law. The common law of the various states differs very materially. In some of the states, the common law of England as it existed prior to the fourth year of King James I. is expressly adopted by statutes, and it results as a matter of course that the decisions of the courts of England subsequent to 1607, the date of the charter of Virginia, under which the colony was established, are not considered as binding (43).

Other states fix the date of the common law so as to include the common law and all of the statutes in aid thereof prior to the Declaration of Independence, or prior to some arbitrary date during the Revolutionary period, so that the student may easily ascertain the fact in a particular jurisdiction by consulting the statutory or constitutional provision. If no express rules are fixed, the Declaration of Independence necessarily limits the period when the common law of England was a part of the law of the colonies (44).

§ 180. The national common law. In considering the existence of a common law of the nation, sufficient has been said to indicate that by natural growth a common law consisting of customs and usages must necessarily

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plain; that is, by degrees to make our laws more uniform and national, especially when there is nothing to make them otherwise but local feeling and prejudices. We have, in the common and federal law, the materials of national uniformity in many cases. We have a national judiciary promoting this unformity, and we have lawyers learned, industrious, and able to second the judiciary. We only want a general *efficient* plan supported with energy and national feelings." 1 Wilson's Works, 335, note.

43 Kallenback v. Dickinson, 100 Ill. 427.

44 1 Wash. Real Prop. 64; Minor's Inst., 67, 81.

develop (45); but the student and the lawyer inquire how far the common law in the narrower sense has become adopted, if at all, into the federal system, and become operative in the federal courts (46).

The question presents itself in two phases:

First, as a source of jurisdiction. In the first case, when the question arose, there was a sharp conflict of opinion. In that case it was sought to punish the defendant criminally as to a matter not made a crime by any act of congress.

The judges were divided on the question of jurisdiction, but it seems that the court adjudged a punishment (47).

It is now well settled, however, that the federal courts have no jurisdiction of subjects of litigation except as conferred by the constitution or the law (48).

The second phase in which questions as to the common law of the United States arise is as to whether rights are to be affected and adjudged according to the principles of the common law, irrespective of or contrary to the decisions of the state courts; and it would seem that even in cases which do not fall strictly within the domain of mar-

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45 Smith v. Alabama, 124 U. S. 478.

46 Mr. Justice McLean said: "*It is clear there can be no common law of the United States.* No one will contend that the common law, as it existed in England, has even been in force in all its provisions in any state in this Union. It was adopted so far as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one state is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced and sanctioned in each." Wheaton et al. v. Peters et al., 8 Pet. 659.

47 United States v. Worrall, 2 Dall. 384; Cooley's Const. Lim., pp. 30, 526.

48 See In re Burrus, 136 U. S. 586, and note on the case, Id. 597-605.

itime and commercial law, the federal courts may and do resort to and apply the common law of the land as such, even though their view of what that law is differs from the decisions of the state courts.

It is not the intention to discuss here the question as to how far the national courts will follow the state courts as to what the law of a state is, but the discussion here will be limited to the common law of the nation.

ILLUSTRATIONS.

In Baltimore & Ohio Ry. v. Baugh (49) Mr. Justice Brewer speaking of a case involving the liability of the employer for an injury to an employee occasioned by the negligence of another servant of the same master said: "In Hough v. Railway Co., 100 U. S. 213, 226, was presented the liability of a company to its servant for injuries caused by negligence, and Mr. Justice Harlan thus expressed the views of the entire court: 'Our attention has been called to two cases determined in the supreme court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of the opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the state in which the cause of action arose, depend on principles of general law, and in their determination we are not required to follow the decisions of the state courts.'" The court, however, wipes away all doubt on the matter of that law in the following language: "But passing beyond the mat-

[49] 149 U. S. 368.

ter of authorities, the question is essentially one of general law. It does not depend on any statute; it does not spring from any general usage or custom; there is in it no rule of property, but it rests on those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of law. Further than that, it is a question in which the nation as a whole is interested."

ILLUSTRATION.

§ 181. Where the question does not involve a state law. The illustrations in the last section show that there is a common law of the nation which the courts will recognize. In the case of Murray's Lessee v. Hoboken Land and Improvement Co. (50), the process in question by which the plaintiff's title was divested was a warrant issued by federal officers in pursuance to federal law, and involved no question of state law or jurisdiction. The question was whether such process authorized by an act of congress was due process of law. Mr. Justice Curtis says: "We must look to those settled usages and modes of proceeding existing in the common law and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend

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[50] 18 How. 227.

there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues."

ILLUSTRATION.

§ 182. Constitutional interpretations by common law. Mr. Justice Matthews, in Smith v. Alabama, says: "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. Moore v. United States 91 U. S. 270" (51).

§ 183. Martial law. "Inter arma silent leges" (52). Martial law is the military rule of the commander having actual occupancy and power, and during the existence of war (53).

Martial law displaces the civil law and places the territory embraced within the declaration of martial law un-

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51 Smith v. Alabama, 124 U. S. 478.

52 In the presence of war the law is silent.

53 Taylor's Private Int. Law, 596 et seq. U. S. v. Dickelman, 92 U. S. 520.

der the rules of military government, which, in effect, amount to but little less than the arbitrary rules of the officers administering the government (54).

Instances of its application in the United States have arisen, and a careful investigation of the litigated and adjudicated cases which have grown out of the exercise of the power of declaring martial law shows the dangerous nature of its application; and it must be admitted that during the time of our recent civil war, citizens were subjected to a deprivation of their liberty and unwarranted injustice and outrage under the guise of martial law. This, however, only illustrates that there is a proper and improper use of all and any of the instruments of government (55).

§ 184. **Military law.** Military law differs essentially from martial law, with which the student is apt to confuse it. Military law consists of the rules and articles of war, statutory provisions and customs which govern those engaged in the military and naval service. It obtains equally in time of peace and time of war (56).

Courts-martial are held by virtue of military law, and,

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54 U. S. v. Dickelman, supra.

55 Ex. parte Milligan, 4 Wall. 2-143. See also Luther v. Borden, 7 How. 1, and notes. Johnson v. Jones, 44 Ill. 142, is one of the most instructive cases upon this subject. In that case Johnson, a resident of a district not engaged in the rebellion, and which had not been declared to be subject to martial law, was arrested, transported from his home to various prisons, denied the right of trial or hearing, and given no means of communication with home or friends. Finally, after being released without arraignment or hearing, he vindicated his right in the civil courts of justice. The case is not widely known, but is extremely interesting and instructive on the subject of martial law.

56 Luther v. Borden, 7 How. 1 (Lawyers' Co-operative Ed.), and notes.

within their jurisdiction, the findings and judgments of such courts are a part of the law of the land, and are not subject to review in civil courts (57).

Such rules and regulations governing the army and the navy, and all the members and officers thereof, are a part of our jurisprudence, and as such a part of the law of the land (58).

§ 185. **Ecclesiastical and canon-law** (59). While the canon law is no part of American municipal law, it may be affirmed that in the same way that the customs of merchants were recognized and respected by the civil courts of England, so the customs and rules of the church will govern in matters purely spiritual (60), while as to civil matters and property rights growing out of membership of the church, the civil courts maintain jurisdiction to protect and preserve the rights of members (61).

These systems are not generally regarded as suitable to this country, and for that reason are not held to be a part of the common law adopted by the states (62).

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57 Johnson v. Sayre, 158 U. S. 109.

58 Clossen v. Armes, 7 Appeal Cases D. C.; 53 Alb. Law Jour. 40. See Middleton v. Crofts, 2 Atk. 650.

60 Watson v. Jones, 3 Wall. 679.

61 Chase v. Cheney, 58 Ill. 509; 11 Am. Rep. 95; Note by Hon. Melville W. Fuller in 10 Am. Law Reg. 314.

62 Jones v. Jones, 90 Hun. 414; Burtes v. Burtes, Hopk. Ch. 557